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85-1402

Supreme Court, U.S.
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JOSEPH F. SPANIOL, J
CLERK

No. 85

In The

Supreme Court of the United States

OCTOBER TERM, 1985

City of Corona
A Municipal Corporation;
City Attorney of Corona, California; James J. Clancy

Petitioners,

vs.

Superior Court of the State of California for the County of Riverside; The "Book Store", being a bookstore and motion picture arcade, located at 601 West Sixth Street, Corona, California; Helen E. Ebel; Thomas Charles Ebel; Does 1 through 10, inclusive,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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211

QUESTIONS PRESENTED

I

Whether the opinion and writ of mandate of the California Supreme Court which interpreted the City of Corona's contract with Clancy for Attorney services to be a contingent fee contract which was against public policy, and disqualified Clancy as the City of Corona's attorney of record in civil litigation to abate obscene matter as a public nuisance:

(A) constituted an arbitrary impairment of, and interference with, the City of Corona's freedom to contract under the 14th Amendment, where a reasonable and objective construction would hold such to be a contract for attorney services at a fixed rate of $60.00 per hour, with a conditional gift by Clancy to the City of Corona of up to $30.00 per hour of "pro bono publico" attorney services, to promote the civil rights of the citizens of the City of Corona and citizens of the State of California, to be free from Obscenity Public Nuisances; and

(B) was preempted by the federal policy regarding the enforcement of civil rights, which favors contingent fee contracts in civil rights lawsuits; and

(C) constituted a violation of equal protection of the laws where, contemporaneously, a federal court has awarded a contingent fee to the attorney for the defendant Ebel and against the City of Corona, for attorney services performed in a civil rights lawsuit between the same parties in the federal court, involving the defendant's stock in trade and manner of doing business in the City of Corona; and

(D) constituted a denial of procedural and substantive due process of law under the 14th Amendment, as an arbitrary interference with the Corona City Council's common law duty to abate moral public nuisances, being an unreasonable construction of the contract which is prohibited by the California doctrine of separation of powers, mandated by Article III, § 3 of the California Constitution?

II

Whether the reasoning expressed in the California Supreme Court's opinion, which holds that a contingent fee contract for attorney services in civil litigation involving governmental functions (which, in theory, should encompass civil rights and private attorney general litigation) is against public policy, was "correct" in principle but "wrong" in application; where the City of Corona's contract with Clancy: (1) is in writing, and (2) sets a fixed hourly rate for the attorney's services, and (3) the "contingency" provision merely relates to the amount of Clancy's gift of "pro bono publico" services to the City of Corona for whom the services are performed, and does not increase or enhance the hourly rate remuneration of Clancy under the contract, or affect the determination of the amount the City might recover under Civil Code § 3496?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The petitioners, City of Corona, a Municipal Corporation, and the City Attorney of the City of Corona, California, and James J. Clancy, a private attorney at law, respectfully pray that a Writ of Certiorari be issued to the Supreme Court of the State of California, to review its Writ of Mandate and Opinion filed on September 16, 1985

JURISDICTION

The Opinion of the Supreme Court of the State of California was filed on September 16, 1985 (see copy at Appendix A-1 through A-26). A timely petition for rehearing was filed on October 1, 1985 (see copy at Appendix B-1 through B-) and was denied by an order filed on November 20, 1985, which modified the September 16, 1985, Opinion (see copy at Appendix C-1 through C-6). The Opinion of the Court of Appeal, Fourth District, Division 2 below was filed on November 15, 1984. (See Appendix D-1 through D-25). This petition for certiorari was filed within 90 days from the date the judgment became final.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3) and Rule 17.1(c) of the U.S. Supreme Court.

STATUTORY PROVISIONS INVOLVED

The text of the following statutes and constitutional provisions is set forth at Appendix E-1 to E- to this petition: California Civil Code §§3479, 3480, 3481, 3491, 3493, 3496; California Code of Civil Procedure §§731, 1021 and 1021.5; California Penal Code §311(a); Business and Professions Code §§17204, 17535; First and Fourteenth Amendments to the U.S. Constitution.

STATEMENT OF THE CASE

When the Respondent "Book Store" moved its stock in trade to a store on the same block as St. Andrews Grammar School in July of 1981, the City of Corona attempted to meet that governmental problem with the zoning approach approved by this Court in Young v. American Mini Theatres, 427 U.S. 50 (1976). At the conclusion of that unsuccessful "land use" effort, the attorney for Respondent Book Store et al., herein, Roger Diamond, a specialist in civil rights litigation, requested and was awarded a contingent attorney's fee at the rate of $175.00 per hour under 42 USC section 1988 for the alleged civil rights violation, Ebel v. City of Corona, 698 F.2d 390 (9th Cir. 1982), Ebel v. City of Corona, 767 F.2d 635 (9th Cir. 1985).

Thereupon in 1983, the Petitioner City of Corona hired Petitioner James J. Clancy, a private attorney at law specializing in obscenity public nuisance abatement litigation, to represent the City in a civil public nuisance abatement lawsuit to abate the Respondent Book Store as a public nuisance, on the ground that the entire stock in trade which was being offered for sale was hard-core pornography which was in violation of the State obscenity statute. At the public hearings before the City Council in September of 1981, Petitioner Clancy had represented the Corona citizens residing in the area surrounding the "Book Store" and had urged the City to apply the civil public nuisance abatement approach on the grounds that the Respondent's entire stock in trade was hard-core pornography. See copies of the Press-Enterprise News articles in September of 1981, attached hereto at Appendix G .

The City of Corona's Attorney's Fee contract with Clancy is consonant with Civil Code section 3496, recently enacted by the State legislature, which authorizes the award of an attorney's fee to the City in such obscenity litigation, based upon restitutionary principles.

Under the City's contract, the City of Corona was obliged to pay Clancy at the flat rate of $60.00 per hour, which was reduced to $30.00 per hour if the City lost or did not receive an attorney's fee award against the Respondent Book Store et al., under Civil Code section 3496. If the City received an award from the Respondent Book Store et al., under Civil Code section 3496 which was less than $60.00 per hour but more than $30.00 per hour, the City was only obligated to pay at the rate of such award, and any sum less than $60.00 per hour was a "pro bono publico" gift of attorney services to the City. In no event was Clancy to receive more than $60.00 per hour.

In appellate proceedings collateral to the ensuing public nuisance abatement litigation which involved the legality of a subpoena duces tecum, the City of Corona prevailed on the merits of a writ of mandate petition which required the Book Store et al., to produce in Court at a hearing on a preliminary injunction 264 magazines which were alleged to be obscene. However, in those mandate proceedings, the California Supreme Court affirmed on the subpoena issue, but reversed the Court of Appeal's ruling on the Book Store's et al. procedural "affirmative defense" and disqualified Clancy on the grounds that his contract with the City was "contingent" and against public policy.

The primary challenge of Petitioners City of Corona and the City Attorney of the City of Corona and James J. Clancy herein is upon equal protection of the law and due process grounds. If Roger Diamond, an attorney who specializes in civil rights litigation, is to be permitted to work for the "Book Store et al.," on a contingent attorney's fee contract on a civil rights theory and receive an award of a contingent attorney's fee against the City at the rate of $175.00 per hour, then the opposing counsel for the City in such confrontation, James J. Clancy, an attorney who specializes in obscenity public nuisance abatement litigation, should be permitted to work for the City of Corona on a contingent fee contract (at the rate of $60.00 per hour) in civil litigation pursuing the City Council's common law governmental duty to abate moral public nuisances and promote the civil rights of its citizens to be free from the corrosive effects of hard-core pornography.

Because of the procedural development of the case, the federal questions herein did not surface until the time of oral argument before the California Supreme Court. At that time, the arguments of certain members of the Court, including the author of the Court's opinion, expressed a bias against the City of Corona's philosophical position in such litigation.[1/] Thereafter, the Court's opinion did not discuss the federal questions which had been raised at oral argument. At that juncture, Petitioner

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[1/] The favorable remarks of Associate Justice Malcolm Lucas during oral argument do not appear as a part of the Court's opinion. Footnote 5, however, contains a statement that has the effect of "defusing" the impact of that opinion; namely, "The City may hire Clancy to represent Holmes." Footnote 5 did not help the City of Corona which, faced with an adverse attorney's fee award, was forced to settle its potential liability by accepting the Respondent Book Store's agreement to move the "Book Store" out of the City upon a payment by the City of $90,000 in attorney's fees. See letter of Ms. Meredith Jury to Roger Diamond, dated October 18 , 1985, a copy of which appears herein at Appendix H . Further, the opinion has had a devastating effect upon Petitioner's representation of the City of Santa Ana in similar civil public nuisance abatement litigation with the Mitchell Brothers' Santa Ana Theater where, after ten years of litigation and on the authority of the Corona decision, Clancy was disqualified in five cases which were then intrain in the Orange County Superior Court. A Petition for Writ of Review by the City of Santa Ana is presently pending in the California Supreme Court to review the denial by the Court of Appeal of the City's Petition for Writ of Mandate to reverse that result in Orange County.

Clancy petitioned the Court for a rehearing and decision on the federal issues which had been framed during the oral argument and sought a transcript of the oral argument to focus upon the merits of the constitutional issues which had been discussed. On three separate applications, the Court refused to permit Petitioner to obtain such a transcript. Concommitantly with the filing of this petition, Petitioners will request the California Supreme Court for a copy of the oral argument to be filed as Appendix I to this petition in a supplemental pleading.

STATEMENT OF FACTS

I. THE CONTRACT FOR SPECIALIZED LEGAL SERVICES (CIVIL ABATEMENT OF OBSCENITY PUBLIC NUISANCE) BETWEEN THE CITY OF CORONA AND ATTORNEY JAMES J. CLANCY.

On June 11, 1983, petitioner City of Corona, a Municipal Corporation, entered into a contract for specialized legal services with James J. Clancy, an attorney licensed to practice law in the State of California (hereinafter "Clancy") to assist the City Attorney in connection with litigation to abate certain conditions within the City, determined by the City Council under the provisions of Ordinance No. 1689 to be public nuisances. Under the terms of the contract (see copy at Appendix E), each civil action in which Clancy assisted the City Attorney was to remain under and subject to the control and direction of the City Attorney or the City Council at all stages. The contract called for a fixed rate of $60.00/hour with a gift to the City of up to $30.00/ hour of pro bono publico attorney services, conditional upon the results of the litigation. Payments for such services was to be made as follows:

> "$60.00 per hour for each hour of ATTORNEY's services, plus out of pocket office expenses incident to such employment, provided, however, that with respect to each and every suit undertaken by ATTORNEY hereunder which results in a final judgment against CITY, said fee shall be reduced to $30.00 per hour, plus out of pocket office expenses incident to such employment, and provided further that said fee of $60.00 shall also be reduced to $30.00 per hour, plus out of pocket office expenses incident to such employment, in each and every suit undertaken by ATTORNEY hereunder in which CITY is the successful party if and to the extent that the City does not recover its attorney's fees from the unsuccessful party or parties."

II. THE FILING OF THE CIVIL PUBLIC NUISANCE ABATEMENT LAWSUIT AGAINST THE CORONA "BOOK STORE" IN THE RIVERSIDE COUNTY SUPERIOR COURT

Acting as attorney of record for the City of Corona (hereinafter "City of Corona") under said contract, Clancy on January 6, 1984, commenced a civil action in the Riverside Superior Court against the "Book Store" 601 West Sixth Street, Corona, by the filing of a

"Complaint for Abatement of Public Nuisances, Declaratory Judgments; Injunctions" and a "Motion for a Preliminary Injunction." In that civil lawsuit, captioned as "People of the State of California ex rel. James J. Clancy, as Special Attorney for the City of Corona, California; City of Corona, a Municipal Corporation vs. The "Book Store, etc., et al., No. 160755," [2] plaintiffs sought, among other things, an adjudication that the stock in trade being sold and exhibited at the "Book Store" was obscene and a public nuisance under California law. On April 20, 1985, the caption was amended by order of Court to show the plaintiffs in the civil action to be "People of the State of California on the relation of the City Attorney of Corona, California; City of Corona, a Municipal Corporation," upon a finding by the trial court that Dallas Holmes, the City Attorney of the City of Corona was the plaintiff in such action, and that James J. Clancy was appearing as an attorney who had been authorized by Mr. Holmes to bring the action on behalf of the City Attorney of the City of Corona. Before commencing the hearing on plaintiff's motion for a preliminary injunction, the Court heard and disposed of several law and motion matters including a motion for change of venue (denied), a motion to disqualify plaintiff's counsel (denied), a motion to quash a subpoena duces tecum (granted), and a motion for a protective order (granted).

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[2] The City Council approved the filing of the civil public nuisance abatement lawsuit in a closed session on December 22, 1983. At that time, the title of proposed City Council Resolution No. 83-102, reading:

RESOLUTION NO. 83-102

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CORONA, CALIFORNIA, DECLARING A PUBLIC NUISANCE AND ORDERING THE CITY ATTORNEY TO TAKE ALL STEPS NECESSARY TO ABATE THE SAME AND RECOVER THE CITY'S COSTS OF INVESTIGATION AND ATTORNEY FEES

was discussed. Upon the recommendation of acting City Attorney Ann T. Thomas, representing the City Attorney's Office, the words "City Attorney" were changed to read "Special Counsel." See Resolution 83-102 at page , line , infra.

III. THE CITY OF CORONA'S PETITION FOR A WRIT OF MANDATE TO ENFORCE THE SUBPOENA DUCES TECUM WHICH REQUIRED THE PRODUCTION OF 262 MAGAZINES AT A HEARING ON A PRELIMINARY INJUNCTION IS GRANTED. THE COURT OF APPEAL ISSUES ITS ALTERNATIVE WRIT.

Thereafter, on May 1, 1984, Clancy filed a "Petition for Writ of Mandate with Supporting Memorandum of Points and Authorities" in the Court of Appeal of the State of California, Fourth Appellate District, Division 2, entitled "People of the State of California, on relation of the City Attorney of Corona, California and City of Corona, a Municipal Corporation, Petitioners vs. Superior Court of the State of California for the County of Riverside, Respondent and "The Book Store," being a bookstore and motion picture arcade, located at 601 West Sixth Street, Corona, County of Riverside, California; Helen E. Ebel; Thomas Charles Ebel; Eugene Van Zie; Does 1 through 10, inclusive, as the Real Parties in Interest, Case No. E000934, seeking the enforcement of a subpoena duces tecum which required (1) the person in charge of the "Book Store" to produce in court one copy of each of 262 magazines, and (2) the vacating of Respondent Superior Court's protective order dated April 20, 1984 which ordered that such magazines need not be produced at the hearing on plaintiff's Motion for a Preliminary Injunction unless the plaintiff procured a grant of immunity. In the Petition for Writ of Mandate, the City of Corona presented the following question of law:

QUESTION PRESENTED

Whether, under recognized principles of general law or waiver, a person called as a witness at a hearing on a motion for a preliminary injunction can be compelled under a subpoena duces tecum to produce 262 magazines where:

(A) the identity and existence of the 262 magazines has previously been established by a declaration in support of the issuance of the subpoena, and

(B) there is a showing by independent evidence that such magazines at the time of service were in the possession of such witness in a representative capacity and for the purpose of offering the same to the public for sale at the "Book Store" as a part of a commercial venture, and

(C) the preliminary injunction

hearing was originated by the City of Corona under a claim of damage to public morals, and in response to a challenge of the operator of the "Book Store" that she has a right to continue offering such magazines for sale at the "Book Store" pending the determination of a public nuisance abatement (obscenity) lawsuit arising out of such possession for sale.

On May 15, 1984, the Court of Appeal issued its Alternative Writ of Mandate (see copy at Appendix F-1 to F-2)[3/].

[3/] One month later, the California Supreme Court established new procedures for administering Writs of Mandate, which had the effect of restricting the authority of the "Court of Appeal" in such matters. See Palma v. U.S. Industrial Fasteners, Inc., 36 Cal.3d 171, 203 Cal.Rptr. 626 (June 7, 1984). As a result, the peremptory writ did not issue out of the California Supreme Court until 15 months later.

IV. THE BOOK STORE FILES A RETURN WHICH INCLUDES BOTH AN ANSWER CONTAINING "AFFIRMATIVE DEFENSES" AND A "CROSS PETITION." THE COURT OF APPEAL DENIES THE BOOK STORE'S REQUEST TO FILE THE "CROSS PETITION."

In their Return to the Alternative Writ, filed on or about June 21, 1984, the Real Parties in Interest, The "Book Store," being a bookstore and motion picture arcade, located at 601 West Sixth Street, Corona, County of Riverside, California; Helen E. Ebel; Thomas Charles Ebel; Does 1 through 10, inclusive (hereinafter "Book Store, et al.") filed both an "Answer" and a "Cross Petition." In their Answer, Book Store, et al. pleaded the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

1. Petitioner PEOPLE OF THE STATE OF CALIFORNIA may not maintain this writ proceeding because it is not represented here nor is it

represented in respondent Superior Court by Dallas Holmes, the City Attorney of Corona.

THIRD AFFIRMATIVE DEFENSE

1. Petitioners may not bring this writ proceeding because their attorney, James J. Clancy, has a contingency fee agreement with the City of Corona and because he is bringing this proceeding and the case below for the benefit of Citizens For Law and Decency.

In their "Cross Petition," the Book Store requested the following affirmative relief:

A. A Writ of Mandate ordering respondent Superior Court of the State of California for the County of Riverside to set aside and vacate its orders of April 20, 1984, which denied their Motion to disqualify attorney James J. Clancy and which granted Plaintiffs' Motion to amend their First Amended and Supplemental Complaint, and

B. Writs of Prohibition

   1. Restraining respondent Court from permitting Plaintiffs to proceed with the action to close the BOOKSTORE;

   2. Restraining respondent Court from permitting Plaintiff THE PEOPLE OF THE STATE OF CALIFORNIA to proceed with this action

      (a) without Dallas Holmes, the City Attorney of Corona, and

      (b) with James J. Clancy and;

   3. Restraining respondent Court from permitting Plaintiff CITY OF CORONA

to proceed with this action.

In a Replication filed on or about July 4, 1984, the City of Corona replied to the First Affirmative Defense by pleading a copy of Resolution 84-35 of the City Council dated May 2, 1984, which amended Section 6 of the City Council's original instruction to Clancy in Resolution 83-102, passed and adopted on December 22, 1983, to read:

> "SECTION 6.
>
> . . .
>
> B. The Special Counsel is hereby ordered to commence a civil lawsuit naming as plaintiffs the City of Corona and People of the State of California, on the relation of the City Attorney of Corona, California, and to proceed as directed in Section 9.16.080 of the Corona Municipal Code, and to take all steps and do all things necessary to abate such nuisances and obtain the relief designated therein, through the judicial proceedings specified therein."

The City of Corona also demurred to the "Cross Petition" for failure to state facts sufficient to constitute a cause of action. By order dated July 24, 1984, the Court of Appeal set the matter for oral argument and ruled that "argument will relate only to the merits of the original petition and response thereto. The request to file cross petition is denied."

V. THE COURT OF APPEAL REJECTS THE BOOK STORE'S "AFFIRMATIVE DEFENSES" AND ISSUES ITS PEREMPTORY WRIT ENFORCING THE SUBPOENA DUCES TECUM AND REQUIRING PRODUCTION OF THE 262 MAGAZINES AT THE HEARING ON THE PRELIMINARY INJUNCTION.

The Court of Appeal heard oral arguments on September 5, 1984, and on November 15, 1984, filed its opinion (see Appendix D-1 through D-25) which rejected the "Affirmative Defenses" on the grounds that the Book Store:

> "offered no persuasive rationale for finding that the contingency fee arrangement compromises Mr. Clancy's ability to represent fairly the interests of the public, including real parties. Nor do we

> perceive any. Therefore we decline either to disqualify Mr. Clancy as counsel for the city or to dismiss the petition." (See Appendix D-11 through D-12.)

In granting its peremptory writ which required that the 262 magazines be produced at the hearing on the preliminary injunction, the Court first reviewed the trial facts surrounding the preparation and execution of the subpoena duces tecum (see Appendix D at pages D-3 to D-5).

> "Petitioners, represented by Mr. Clancy, shortly thereafter filed a complaint against the real parties in interest for abatement of a public nuisance, declaratory judgment and an injunction. Petitioners dispatched several police officers to the 'Book Store' for the purpose of photographing the literature on sale in the retail section of the store and the motion picture films on exhibit in the 'arcade' section. The officers photographed some 262 different magazines and books. The photographs together with a declaration by the police officer in charge of the surveillance operation were filed with the respondent superior court in support of petitioners' motion for a preliminary injunction."

> "Shortly thereafter petitioners served a subpoena duces tecum upon

> real parties in interest demanding the production of the aforesaid 262 publications as evidence in support of a preliminary injunction that obscene materials were being offered for sale. Although the subpoena was originally served upon Timothy Groover, the clerk in charge of the store, the parties by stipulation have deemed the subpoena to have been served upon real party in interest Thomas E. Ebel."

Following its analysis of _Fisher v. U.S._, (1976), 425 U.S. 391; _United States v. Doe_, (1984, ____ U.S. ____, 104 S. Ct. 1237, 79 L.Ed.2d 552; _Anderson v. Coulter_, (1972), 108 Ariz. 388, 499 P2d 103; _Houston v. Manerbino_, (1974), 185 Colo. 1, 521 P.2d 166, the Court of Appeal's opinion concluded that the Fifth Amendment could not be invoked. (See Appendix D at pages D-21 to D-22.)

> "Applying the foregoing legal principles and decisions to the facts of the case before us compels the conclusion that real parties are not entitled to invoke the Fifth Amendment privilege with respect to the publications requested in the subpoena. _The affidavits and declarations filed in support of the subpoena amply demonstrate_

> that the 'existence, possession and authenticity' of the magazines are indeed a 'foregone conclusion.' (*Fisher v. United States*, *supra*, 425 U.S. at 411, 96 S.Ct. at 1581.) Moreover, real parties themselves need not testify in order to authenticate or identify the books in question, nor obviously could they be forced to do so under the Fifth Amendment." (our emphasis). 4/

On or about December 19, 1984, Book Store, et al. filed a Petition for Hearing in the California Supreme Court which raised the following two issues:

A. May a City Attorney bring an

4/ The record *also* shows that at the time of *service* of the subpoena upon Groover, the officers *again* photographed the literature on sale in the retail section of the store. The *second* set of photographs together with a *second* declaration by the police officer in charge of the surveillance operation, was filed with the Respondent Superior Court in support of the motion for a preliminary injunction as evidence that all but 4 of the magazines and books which were named in the subpoena duces tecum *were in the Book Store at the time the Subpoena Duces Tecum was served.*

(See page 4, line 24 through page 6, line 2 and Exhibit 2 to the Supplement to action on behalf of the People of the State of California to close an adult bookstore as a public nuisance if such attorney is employed under a contingency fee agreement?

B. Does the enforcement of a subpoena duces tecum for the production of 262 allegedly obscene publications violate the Fifth Amendment privilege against self incrimination of the person to whom the subpoena duces tecum is directed?

By letter to the Clerk of the Court dated January 28, 1985, the attorney for Book Store called the attention of the Court to the fact that this Court on January 1 had granted a hearing in United States

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4/(continued) Petition for Writ of Mandate, filed with the Court of Appeal on or about May 18, 1984, being the "Second Declaration of Les Scott," executed on May 18, 1984).

v. Doe, No. 84-823, and that a "related issue is now before the United States Supreme Court." On February 27, 1985, the California Supreme Court filed its order granting a hearing in People of the State of California on relation of the City Attorney of Corona, California; City of Corona, a Municipal Corporation v. Superior Court of the State of California for the County of Riverside, Respondent; The "Book Store," et al. Real Parties in Interest LA #32041. By notice dated May 10, 1985, the Clerk of the California Supreme Court informed the parties that "LA 32041 People ex rel. Clancy v. Superior Court" would be argued on June 12, 1985. By reply dated May 23, 1985, Clancy informed the Clerk that "This title is incorrect. It should read People of the State of California on relation of the City Attorney of Corona, California; City of Corona, a Municipal Corporation vs. Superior Court."

SUMMARY

The rationale which supports the Court's "public policy" disqualification of Clancy is premised upon the erroneous assumption that a civil obscenity abatement action is akin to a criminal prosecution which only "government" may bring. The Court is mistaken. Private persons can bring nuisance abatement actions whenever the obscenity nuisance is a private nuisance to such persons. Further, "any person" can bring such an action under the unfair trade practices statute as interpreted by the California courts. Since this is so, How are the Ebels prejudiced?

Objectively appraised, the City's contract with Clancy is not "contingent". It sets a fixed hourly rate for services to promote the common law right to be free from obscenity with a "gift" back of "pro bono publico" attorney services, the amount of which is determined by future events in the lawsuit.

The Court's distorted construction constitutes an impairment of and interference with the City's freedom to contract and a violation of the state's doctrine of separation of powers which interferes with the City Council's common law duty to abate moral public nuisances. The Court's failure to give the contract its reasonable interpretation constitutes a denial of procedural and substantive due process.

The reasoning in the opinion, when analyzed in the background of the subject matter discussed during oral argument, evidences a prejudicial bias of the author against the City's efforts and a denial of substantive and procedural due process.

The right of Corona's citizens to

be free from the degrading and corrupting influences of obscenity public nuisances is a civil right within the ambit of federal protection. The federal law favors "contingent fee" contracts in the civil rights area and precludes a state from adopting a public policy which contraverts the federal policy.

It is a clear denial of equal protection to permit Ebel's attorney to perform under a contingency fee arrangement and to deny the same right to the City of Corona in the same civil public nuisance abatement litigation.

If contingent fee contracts for attorneys representing the public are "wrong" in principle without reference to specific facts, then the basis upon which Civil Rights Attorney's Fees are awarded must be reexamined. The same is true of Private Attorney General

Attorney Fee Awards. The "governmental" distinction is not valid-- in many cases, the defendants in Civil Rights actions and Private Attorney General actions are private parties. Further, in many public nuisance abatement cases, the real plaintiff is not "governmental" but rather a small community of individuals.

If the California Supreme Court's "Public Policy" statement is "right" in principle, it is "wrong" in practice. The federal Civil Rights contingent fee system could be improved by requiring the contingent fee to be in writing and at a fixed hourly rate, with a specific provision for segregating the "pro bono publico" factor.

The transcript of oral arguments before the California Supreme Court clearly establishes that the federal questions herein were timely presented in the State Court.

REASONS FOR GRANTING THE WRIT

I

(A) THE RATIONALE FOR THE COURT'S "PUBLIC POLICY" DISQUALIFICATION OF CLANCY IS PREMISED UPON THE FALLATIOUS ASSUMPTION THAT CIVIL PUBLIC NUISANCE ABATEMENT LAWSUITS ARE AKIN TO CRIMINAL PROSECUTIONS WHICH CAN ONLY BE BROUGHT BY "GOVERNMENT".

The rationale of the California Supreme Court's opinion which supports the court's "public policy" disqualification of Clancy is premised upon the fallatious assumption that a civil action to abate a public nuisance is akin to a criminal prosecution which only "government" may bring. The Court's Opinion concluded that, "Thus, we may order that Clancy be dismissed from the case if we find the contingent fee arrangement prejudices the Ebels."

The Court's opinion has failed to consider the fact that such a civil action may also be brought by an owner of real property in the immediate area as to whom such unlawful practice is a private nuisance. Civil Code section 3493. Further, any "interested person" can bring such action on the theory that such sales, etc., are unlawful business practices. See People ex rel. Van de Kamp v. Ewap, Inc., 106 Cal.App.3d 315; 165 Cal.Rptr. 73 (1980), which holds that the business of dealing in obscenity is also an "unlawful trade practice" under Business and Professions Code sections 17204 and 17535. Any "person acting for the interests of itself, its members, and the general public" can file an action to enjoin such unlawful conduct. Since this is so, what is the "prejudice" to the Ebels?

Further, if such an action were brought by "any person", would the Court's opinion preclude Clancy from rendering such services under the same "contingency" fee agreement? If not, why not?

(B) THE "DUE PROCESS OF LAW" QUESTION

The City of Corona contends that, reasonably and objectively appraised in the light of the operative facts, the City's contract for attorney services with Clancy was not a contingency fee contract which was against the public interest but, on the contrary, was in fact and law a contract for hire at a fixed hourly rate of $60.00/hour, to perform specialized legal services to promote the common law right of the citizens of Corona and of the State of California to be free from the degrading and corruptive effects of obscenity public nuisances, in which the "contingency" factor merely related to the amount of Attorney Clancy's agreed upon gift of "pro bono publico" services to the City for whom the services were to be performed, and did not enhance the hourly rate remuneration which Clancy was to receive under the contract, or affect the amount which the City might recover under Civil Code Section 3496. The objectives of the Corona contract with Clancy are clearly consistent with "good" public policy.

The California Supreme Court's broad construction of the contract as a "contingency fee contract which is against public policy" is distorted and so much at variances with the clear language of the contract, and the operative trial facts as to constitute an impairment of and interference with the City of Corona's freedom to contract, and an arbitrary deprivation of substantive due process of law under the 14th Amendment to the Federal Constitution.

The City of Corona also contends that, under the doctrine of separation of powers set forth in Article III Section 3 of the California Constitution, the California Supreme Court was required to give the City's contract the reasonable and objective interpretation set forth above, and that their failure to do so constitutes an arbitrary interference with the Corona City Council's common law duty to abate moral public nuisances and a denial of procedural and substantive due process of law under the 14th Amendment to the Federal Constitution.

The City of Corona further contends that the reasoning applied by the Court in its opinion filed on September 16, 1985, when taken in context and evaluated together with the oral argument which took place before the California Supreme Court on February 27, 1985, when the federal questions herein first surfaced, evidences a prejudicial bias on the part of the author of that opinion against the City of Corona's determined effort to abate the "Book Store" as a moral public nuisance, and constitutes a denial substantive and procedural due process of law under the 14th Amendment to the Federal Constitution.

(C) THE "PREEMPTION" QUESTION

42 USC Section 1988 preempts the California Supreme Court from adopting a broad public policy barring contingent fee contracts in the type of Civil Rights litigation which the City has initiated.

The right of citizens of the City of Corona and of the State of California to be free from the degrading and corruptive influences of obscenity public nuisances is a fundamental right under the common law. As such it is a Civil Right within the ambit of the federal protection from unreasonable state action afforded by the Civil Rights Statute, 42 USC Section 1983 and 42 USC

Section 1988.

The interpretative decisions of this Court, construing 42 USC Section 1988, have uniformly favored "contingent fee" contracts in Civil Rights litigation.

The doctrine of federal preemption precludes a state court from establishing a broad, general restriction relative to attorney fee contracts in Civil Rights litigation which will controvert federal policy, i.e.. bar contingent fee contracts in such litigation.

(D) THE "EQUAL PROTECTION OF THE LAWS" QUESTION

The City of Corona's "Equal Protection of the Laws" claim draws in focus the fundamental question as to whether, pursuant to the Common Law duty of the City Council of the City of Corona to abate moral (obscenity) public nuisances, the correlative fundamental common law right of the citizens of Corona to be free from the degrading and corruptive influences of obscenity public nuisances is of the same order and magnitude as civil rights of persons, generally, under 42 USC Section 1983 and the Federal Constitution.

If the answer to the "civil rights" question is "yes," then it must logically follow therefrom that, even if the contract for legal services between the City of Corona and Attorney Clancy were to be construed as a contingent fee contract, the Writ of Mandate of the California Supreme Court which disqualified Clancy as the City of Corona's attorney of record, for that reason, in the civil litigation to abate the "Book Store's" stock in trade as obscene matter and a public nuisance, was a denial of a civil right under 42 USC Section 1988, in as much as that section has been uniformly interpreted by this Court to favor "contingency fee" contracts in civil rights cases.

The operative facts show that defendant's attorney Roger Diamond represented the defendant Ebel as a federal plaintiff in a Civil Rights Action in 1981 against the City's efforts to apply a Corona Zoning Ordinance to her "Book Store" business located on the same block as St. Andrews Grammar School, see Ebel v. City of Corona, 698 F2d 390 (9th Cir. 1983); Ebel v. City of Corona, 767 F2d 635 (9th Cir. 1985), (zoning ordinance regulating establishments whose stock in trade is distinguished or characterized by an emphasis on matters relating to "specific sexual activity" and "specific anatomical areas"). In a motion for attorneys' fee under 42 USC Section 1988, Diamond sought a contingency fee at the rate of $175.00 per hour and was awarded a contingency attorney fee at the rate of $175.00 per hour. It is a clear denial of equal protection of the laws to permit Attorney Diamond to represent the defendant "Book Store" under a contingency fee arrangement in this civil public nuisance abatement action and to deny that same right to the plaintiff, City of Corona, in its contract with Attorney Clancy. There is no rational basis for making such a distinction between the parties to this action.

(E) IF CONTINGENT FEES FOR ATTORNEYS REPRESENTING THE PUBLIC ARE WRONG IN PRINCIPLE WITHOUT REFERENCE TO SPECIFIC FACTS, THE BASIS UPON WHICH CIVIL RIGHTS ATTORNEY FEES ARE AWARDED MUST BE REEXAMINED.

If, as a broad, general principle and without reference to specific facts, contingent fees for attorneys representing the public are against public policy, then this Court and the California Supreme Court must reexamine the basis upon which attorneys' fees are regularly awarded in civil rights litigation (42 USC Section 1988) and private attorney general litigation (CCP Section 1021.5). In both instances, the use of contingent fee contracts is openly encouraged.

At the commencement of oral argument on February 27, 1985, when the federal questions herein were first raised, Attorney Clancy, in responding to Chief Justice Bird's and Justice Mosk's suggestion that it was against public policy for an attorney who represents the public to be employed on a contingency basis, stated that an adoption of that broad principle by the California Supreme Court would undermine the present practice of the

U.S. Supreme Court in Civil Rights cases under 42 USC Section 1988 and the practice of the California Supreme Court in Private Attorney-General litigation under CCP Section 1021.5. Midway through defense attorney Diamond's oral argument, Associate Justice Grodin astutely picked up on Clancy's proposition and addressed the following hypothetical to Diamond: "Suppose an attorney brings an action as a private attorney general to abate the unlawful practice[5/] of a City's use of electric current in support of a religious practice?" to which Diamond noted:

[5/] See People ex rel. Busch, et al. v. Projection Room Theater, et al., 17 Cal.3d 42; 130 Cal.Rptr.328 (1976) which holds that the business of dealing in obscenity is a "public nuisance" which is subject to abatement. See, also, People ex rel. Van de Kamp v. EWAP Inc. 106 Cal.App.3d 315; 165 Cal.Rptr. 73 (1980) which holds that the business of dealing in obscenity is also an "unlawful trade practice." In both cases, one of the remedies is an injunction.

"That was the Fox case." In Fox v. City of Los Angeles, 22 Cal.3d 794 at 813, 150 Cal.Rptr. 867 at 880 (1978), the plaintiff (Fox) sued as a private attorney-general to enjoin the 30 year practice of illuminating the window of the City Hall tower in the form of a cross on Christmas Eve. Upon the affirmance of the final injunction, Fox's attorney was awarded a contingent attorney's fee in the approximate amount of $9,000.

With reference to that Fox case, the City of Corona contends that there is no basis whatsoever for broadly applying the public policy "principles" expressed by Justice Mosk against the City of Corona acting as the designated governmental official in People ex rel. City Attorney of Corona, et al. v. Superior Court, Supra, and without reference to the operative facts, and denying the applicability of those same broad principles to the "acting" governmental official (Fox) in private attorney-general litigation. This Court can and must take judicial notice of the well-known fact that attorneys representing civil rights plaintiffs and private attorney general plaintiffs are just as often not objective in their weighing in the balance of the governmental interest at issue, and in their "discretion" to file or not to file civil litigation and to continue with or terminate their civil litigation at any stage of the proceedings as the trial facts develop. To draw a distinction between Fox and the Corona lawsuits without reference to specific disqualifying facts in each case, is to invite criticism by the general public that it is not a matter of "principle" but rather depends upon"whose ox is being gored."

Nor is there any reason, in principle, for drawing a classification distinction on the grounds that in Civil Rights cases and private attorney-general cases, the defendant is "government" and in the Corona case, the defendant is Helen Ebel a private "individual." In both civil rights litigation and private attorney-general litigation, the "contingent" attorney fee award can be applied against private "individuals" as well as governmental bodies. In civil rights cases, see City of Riverside v. Rivera, 473 U.S. ____, 87 L. Ed.2d 683 (Application for Stay granted by Justice Rehnquist, Aug. 28, 1985), cert. granted in 474 U.S. ____ 88 L. Ed.2d 253 (Oct. 21, 1985). In private attorney-general cases, see Franzblau v. Monardo, 108 Cal.App.3d 522, 166 Cal.Rptr. 610 (1980).

Further, in many instances in which

"government" acts as the nominal plaintiff, the real parties in interest are a small class of "individuals," as here, where the People of the State of California ex rel. City Attorney of Corona acting as the nominal state plaintiff and the City of Corona acting as the local nominal plaintiff, represent the class of individual citizens residing in the near vacinity of the "Book Store," as to whom the "nuisance" is both a "public nuisance" and a "private nuisance." In this latter situation, there is clearly no rational reason for treating the class of "individuals" who are plaintiffs (Corona citizens affected) differently than the class of "individuals" who are defendants (Helen Ebel and the "Book Store"). See People ex rel. Busch, et al. v. Projection Room Theater, et al., 17 Cal.3d 42 at 55 where the California Supreme Court held:

> We do not suggest, of course, that law enforcement officers in each city and county in this state have a mandatory duty always and everywhere to abate the exhibition of obscene matter within their borders. The particular nature of the exhibition, and its effect upon the community, may vary considerably in time and place. Law enforcement officers accordingly are vested with wide discretion to decide whether or not to initiate the kind of formal abatement proceedings such as those instituted in the matters before us. (See Code Civ.Proc., Section 731.) Once a community through its public officials has determined that a particular display of obscene materials amounts to a public nuisance which is injurious to the safety and morals of that community, no valid reason exists why, adequate constitutional procedural safeguards being met, the remedy of civil abatement proceedings must be denied such community. The availability of the public nuisance procedure may prove useful for those local entities which, determining that they are confronted with commercial exploitation of obscene materials resulting in the conditions contemplated in section 370, elect to use it. (our emphasis)

The City of Corona contends that, although the Corona contract with Clancy is not a contingent fee contract, see Point , supra, the amount of attorney's fee litigation which has been spawned in civil rights and private attorney general litigation by admitting oral contingency fee contracts which do not establish an agreed upon fixed hourly rate, may be reason for endorsing and extending the public policy "principles" announced by Justice Mosk's opinion to 42 USC Section 1988 litigation. A requirement that the civil rights attorney fee contract be in writing and set a fixed hourly rate with a provision setting forth the amount of the "pro bono publico" services which does not affect the determination of the value of the services being performed would reduce the 42 USC Section 1988 litigation immeasurably and would prevent extravagant and disparate fee awards such as those made to Professor Lawrence Tribe and to plaintiff's counsel in City of Riverside v. Rivera, 679 F.2d 795 (CA 9 1982), 763 F.2d 1580 (1985). Further, the adoption of such a principle would establish a "cap" and would provide an answer to the sometimes voiced criticism that trial courts in such cases are awarding punitive damages based upon the trial judge's personal prejudices rather than reasonable attorney's fee based upon the regular established hourly rates.

(F) THE FEDERAL QUESTIONS WERE TIMELY PRESENTED IN THE STATE COURT AT THE ORAL ARGUMENT BEFORE THE CALIFORNIA SUPREME COURT AND IN A PETITION FOR REHEARING.

Due to the manner in which the plaintiff's Petition for Writ of Mandate developed in the Court of Appeal, and the procedures in the California

Supreme Court for reviewing a lower court's peremptory writ, the federal questions presented herein were first raised in the State Court at the time of oral argument in the California Supreme Court. Prior thereto, the Court of Appeal below had granted the plaintiffs' request for relief which sought enforcement of the subpoena duces tecum, and had issued its alternative writ of mandate on the subpoena issue only. See Appendix F. The defendants' attempt to broaden the issues by the filing of a cross petition for review of the trial court's denial of the defendants' motion to disqualify Attorney Clancy was rejected by the Court of Appeal in an order dated July 24, 1984, which ruled that "argument will relate only to the merits of the original petition and response thereto. The request to file cross petition is denied." Thereafter, the Court of Appeal's opinion and judgment enforcing the subpoena duces tecum rejected the defendants' procedural "affirmative defenses" on state grounds, perceiving "no reason in logic or public policy for broadly holding that attorneys who represent the public may not be employed on a contingency fee basis. The issue is one that must be decided by reference to the particular facts and circumstances of each case."

Under the procedures in effect on February 27, 1985, when the California Supreme Court granted its petition for a hearing, oral arguments in the California Supreme Court were scheduled and conducted on the briefs which had been filed in the Court of Appeal below, with the plaintiffs, as the petitioner for a Writ of Mandate in the Court of Appeal, opening the oral argument, even though they were the prevailing party in that Court. See Rule 29.3 of the California Rules of Court which changes that procedure. In spite of this inverted presentation, almost all of the 30 minutes allotted to the plaintiffs for argument were spent in a lively inquiry from certain of the justices regarding the "contingent fee" aspect, the terms of the contract, and the public policy involved.

Notwithstanding the fact that the above-described due process and equal protection of the laws issues which are inherent in the Court's broad holding that an attorney who represents the public may not be employed on a contingency fee basis, were raised and discussed during plaintiffs' oral argument, the opinion of Justice Mosk filed on September 16, 1985, was silent on those issues, and it became necessary to petition for a rehearing in order that such issues might be made a matter of record. See Petition for Rehearing at Appendix B on page . Nor did the Court address such issues in the Court's modification of its opinion. See Appendix C at page C- . Thereafter, three separate applications were made to the California Supreme Court for permission to have the oral arguments transcribed at plaintiff's expense, to assist in the preparation of a Petition for Rehearing and for the record on a Petition for Writ of Certiorari to this Court. On each of those occasions, the application was denied, except that on the third application, permission was granted the attorney of record permission to listen to the tape once, and take notes. When Petitioner Clancy visited the California Supreme Court to listen to the tape, he was advised that he could not have the secretary who accompanied him take down a shorthand transcription of the oral arguments while he listened.

The opinion of the California Supreme Court arrogates to the Court governmental powers belonging to the City. The questions which the opinion poses are important ones to municipal government. Notwithstanding the underlying state public nuisance abatement action has been compromised (see Appendix H), the City of Corona considers such questions to be deserving of an answer and that this Court should be petitioned to review the action taken by the California Court. (See Resolution 86-9, authorizing the filing of this Petition, at Appendix "J").

CONCLUSION

For all of the above reasons, the Court should grant this petition and set the case for argument on the issues herein presented.

DATED: February 18, 1986

Respectfully submitted,

JAMES J. CLANCY
Counsel for Petitioner.

CERTIFICATE OF SERVICE

I, hereby certify that on this 18th day of February, 1986, the original and 40 copies of the within Petition for Writ of Certiorari were deposited in the United States Post Office in Van Nuys, California, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

J. David Hennigan
Judge, Superior Court
4050 Main St.
Riverside, CA 92501

Roger Jon Diamond
15415 Sunset Blvd.
Pacific Palisades, CA 90272

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Attorney for Petitioner.

APPENDIX A

OPINION OF THE CALIFORNIA SUPREME COURT FILED ON SEPTEMBER 16, 1985, ENTITLED THE PEOPLE EX REL. JAMES J. CLANCY, AS CITY ATTORNEY, ETC., ET AL., PETITIONERS V. THE SUPERIOR COURT OF RIVERSIDE COUNTY, RESPONDENT; HELEN E. EBEL, ET AL., REAL PARTIES IN INTEREST

HELEN E. EBEL, ET AL., PETITIONERS,

V.

THE SUPERIOR COURT OF RIVERSIDE COUNTY, RESPONDENT; THE PEOPLE EX REL. JAMES J. CLANCY, AS CITY ATTORNEY, ETC., ET AL., REAL PARTIES IN INTEREST A1-A26

(Reference: Petition at page)

SUPREME COURT
FILED
SEP 16 1985
LAURENCE P. GILL, Clerk

____
Deputy

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

HELEN E. EBEL et al.,

Real Parties in Interest.

HELEN E. EBEL, et al.,

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,

Real Parties in Interest.

L.A. 32041

Super Ct. No. 160775

We evaluate the propriety of a contingent fee arrangement between a city government and a private attorney whom it hired to bring abatement actions under the city's nuisance ordinance. We hold the arrangement inappropriate under the circumstances, and in the interests of justice grant the extraordinary relief of disqualifying the attorney.

In 1981 Helen Ebel obtained a business license from petitioner City of Corona (City), and began operating a business known as the Book Store. The Book Store sells sexually explicit reading materials and provides an arcade section for viewing sexually explicit films. This action arises from the City's efforts to close the Book Store.

Within a few months after Ebel opened for business the City adopted two ordinances regulating adult bookstores, one defining "sex oriented material" and the other restricting the sale of such material to certain zones in the City. The city manager informed Ebel she would be compelled to move the Book Store because it was within 750 feet of a church that operated a school for minors. Ebel filed an action in federal court attacking the constitutionality of these ordinances. The circuit court of appeals directed entry of a preliminary injunction in her favor. (Ebel v. City of Corona (9th Cir. 1983) 698 F.2d 390.) The district court thereafter held the ordinances unconstitutional and granted a permanent injunction, and the judgment was affirmed on appeal. (Ebel v. City of Corona (9th Cir. Aug. 1, 1985) ___ F.2d ___.)

Frustrated by its defeats in federal court on the constitutional issues, the City retained the services of Attorney James J. Clancy to abate nuisances under a new ordinance proposed on the same day. The ordinance defined a public nuisance as "Any and every place of business in the City . . . in which obscene publications constitute all of the stock in trade, or a principal part thereof . . . ." Clancy had drafted this and the previous ordinances relating to the sale of sexually explicit material, and had presented them for consideration by the City Council. He is associated with an organization entitled Committee for Decency through Law.

Two weeks later the ordinance was passed. Following an investigation by the police department, the City adopted a resolution declaring the Book Store to be a public nuisance and revoking its business license. A complaint was filed, on the relation of the City and Clancy as its "special attorney," against Ebel, her son Thomas Ebel, Eugene Van Zee, and the Book Store, for abatement of a public nuisance, declaratory judgment, and an injunction. Police officers were sent to the Book Store to photograph the magazines on sale and the movies available for viewing. The City then served a subpoena duces tecum on Timothy Groover, a clerk at the store.[1] The subpoena demanded that Groover (now Thomas Ebel) appear in court and produce the 262 publications that the police had photographed, to permit the court to determine whether the publications are obscene.

The court allowed the City to amend its complaint by substituting "City

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[1] Groover was subsequently discharged. By stipulation the parties have deemed the subpoena to have been served on Thomas Ebel, currently a clerk at the Book Store.

Attorney of Corona" as Clancy's title in the action, and granted defendants' motion to prevent production of the magazines. The City petitions for writ of mandate to compel the court to vacate its order that Thomas Ebel need not bring the magazines to court, and to order Helen Ebel to produce the magazines. The Ebels cross-petition to compel the court to vacate its order denying defendants' motion to disqualify Clancy as attorney for the City, and its order permitting plaintiffs to amend the complaint. They also seek a writ of prohibition to bar the People from proceeding with Clancy instead of the regular City Attorney of Corona as its representative, and from permitting the City to proceed as a party.

I. Enforcement of the Subpoena Duces Tecum

The parties hotly debate the issue whether the subpoena duces tecum, which orders Thomas Ebel to produce 262 magazines offered for sale at the Book Store, violates his privilege against self-incrimination.[2] Thomas Ebel is potentially subject to prosecution under Penal Code section 311.2, which prohibits the sale of obscene material. The parties agree that certain elements of the crime have been established by independent evidence (i.e., existence, possession, and authentication), and thus the act of producing the magazines is to that extent not "testimonial" and "incriminating." (See Fisher v. United States (1976) 425 U.S. 391, 408.) However, the parties disagree whether the element of scienter, which must be proved in order to convict, has been established by other evidence and whether it would be established by the act of gathering the magazines and bringing them into court.

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[2] The City also seeks a writ to compel Helen Ebel to produce the magazines. But no subpoena was served on Helen Ebel, and this request was never presented to the trial court. In addition, since we conclude that Thomas Ebel may not claim the protection of the Fifth Amendment in this case, the issue is moot.

We need not reach this question. The Fifth Amendment cannot be "employed by an individual to avoid production of the records of an organization, which he holds in a representative capacity as custodian on behalf of the group. . . . [T]he papers and effects which the privilege protects must be the property of the person claiming the privilege, or at least in his possession in a purely personal capacity." (Bellis v. United States (1974) 417 U.S. 85.) This rule applies even if the evidence might incriminate the holder personally. (Id. at p. 88.) The magazines named in the subpoena duces tecum are the property of the Book Store, an artificial entity that cannot claim the privilege against self-incrimination. (Id. at p. 90.) Thomas Ebel has possession of the magazines only in his capacity as clerk at the Book Store. He therefore cannot avoid compliance with the subpoena.

II. The Contingent Fee Arrangement

The contract of employment between the City and Clancy contains a fee provision according to which Clancy is to be paid $60 per hour, "provided, however, that with respect to each and every suit undertaken by Attorney hereunder which results in a final judgment against CITY, said fee shall be reduced to $30.00 per hour . . . and provided further that said fee of $60.00 shall also be reduced to $30.00 per hour . . . in each and every suit undertaken by ATTORNEY hereunder in which CITY is a successful party if and to the extent that the CITY does not recover its attorney's fees from the unsuccessful party of parties."

The Ebels contend it is improper for an attorney representing the government to have a financial stake in the outcome of an action to abate a public nuisance. They maintain that a government attorney prosecuting such actions must be neutral, as must an attorney prosecuting a criminal case. Accordingly, we must first examine the requirement of neutrality imposed on government attorneys in certain cases, and then determine whether this requirement applies to attorneys prosecuting public nuisance actions.

At the outset we emphasize that the courts have authority to disqualify counsel when necessary in the furtherance of justice. (Code Civ. Proc., § 128, subd.(a)(5); William H. Raley Co. v. Superior Court (1983) 149 Cal.App.3d 1042, 1048; see also People

v. Superior Court (Greer) (1977) 19 Cal.3d 255, 261, fn. 4; People v. Municipal Court (Byars) 77 Cal.App.3d 294, 298-299.) Thus we may order that Clancy be dismissed from the case if we find the contingent fee arrangment prejudices the Ebels.

In People v. Superior Court (Greer), supra, 19 Cal.3d 255, we reviewed the responsibilities associated with the prosecution of a criminal case: "The prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted. [Citations.] In all his activities, his duties are conditioned by the fact that he 'is the representative not of any [sic] ordinary party to a controversy, but of a sovereighty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" (Id. at p. 266, quoting Berger v. United States (1935) 295 U.S. 78, 88.) The American Bar Association's Code of Professional Responsibility elaborates on the public prosecutor's duty to seek justice: "This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all . . . ." (ABA Code of Prof. Responsibility, EC 7-13.)

Thus a prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly. These duties are not limited to criminal prosecutors: "A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results." (Id., EC 7-14.)

Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive. (See id., EC 9-1, 9-2.)

When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated. For this reason prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function. For example, in People v. Superior Court (Greer), supra, 19 Cal.3d 255, we disqualified the prosecutor because a woman working in his office was the victim's mother , was a material witness, and stood to gain custody of the victim's children if the defendant was convicted. in Tumey v. Ohio (1927) 273 U.S. 510, the United States Supreme Court outlawed a system whereby the mayor of a town served as judge in liquor possession cases in which the punishment was a fine. The money paid pursuant to the fine went into a fund from which the mayor could recover his costs for hearing the case. And in Ward v. Village of Monroeville (1972) 409 U.S. 57, an Ohio statute authorizing mayors to sit in ordinances violation cases, the fines from which would go into the municipality's coffers, was held unconstitutional. "[T]he test is whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused . . . .'" (Id. at p.60, quoting, Tumey, supra, 273 U.S. at p. 532; see also People v. Conner (1983) 34 Cal.3d 141 [conflict of interest where deputy district attorney was a witness to and arguaby a victim of the criminal conduct being prosecuted by others in his office].)

A city attorney is a public official. (People ex rel. Chapman v. Rapsey (1940) 16 Cal.2d 636, 639.) The American Bar Association's Code of Professional Responsibility addresses the special considerations applicable to a lawyer who is also a public official: "A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties." (ABA Code of

Prof. Responsibility, EC 8-8.) "[A]n attorney holding public office should aviod all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success of personal interests." (ABA Committee on Prof. Ethics, opn. No. 192 (1939); see also People v. Conner, supra, 34 Cal.3d 141, 146.)

It is true that the retainer agreement between the City and Clancy provides that Clancy is to be "an independent contractor and not an officer or employee of City." However, a lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: if Clancy is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards.

In the case at bar, Clancy has an interest in the result of the case: his hourly rate will double if the City is successful in the litigation. Obviously this arrangement gives him an interest extraneous to his official function in the actions he prosecutes on behalf of the City.

Contingent fee contracts for criminal prosecutors have been recognized to be unethical and potentially unconstitutional, but there is virtually no law on the subject. "[T]he contingent fee is generally considered to be prohibited [in] the prosecution and defense of criminal cases. However, there are so few cases, and these are predominantly old, that it is doubtful that there can be said to be any current law on the subject. Usually cited is a 1920 case from New Mexico in which the court refused to enforce a contingent fee contract calling for a larger fee if the defendant was convicted, for a lawyer assisting a prosecuting attorney. The court declared that the contingent element was against public policy because it tended to bring about conviction regardless of the prosecutor's primary duty to see that justice was done." (MacKinnon, Contingent Fees for Legal Services (1964) p. 52.) More strongly worded is the comment to standard 2.3(e) of the American Bar Association Standards Relating to the Prosecution Function: "It is clear that [case-by-case] fee systems of remuneration for prosecuting attorneys raise serious ethical and perhaps constitutional problems, are totally unacceptable under modern conditions, and should be abolished promptly."

The justification for the prohibition against contingent fees in criminal actions extends to certain civil cases. As discussed above, the rigorous ethical duties imposed on a criminal prosecutor also apply to government lawyers generally. "The county attorney is a county office and as such is a representative of the people, although his duties relate only to civil matters." (ABA Committee on Prof. Ethics, opn. No. 186 (1938).)

Nothing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel. Certainly there are cases in which a government may hire an attorney on a contingent fee to try a civil case. (See, e.g., Denio v. City of Huntington Beach (1943) 22 Cal.2d 580 [contingent fee arrangement whereby the city hired a law firm to represent it in all matters relating to the protection of its oil rights].) But just as certainly there is a class of civil actions that demands the representative of the government to be absolutely neutral. This requirement precludes the use in such cases of a contingent fee arrangement.

In *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, we held applicable to an eminent domain action the requirement that government attorneys be unaffected by personal interests: "Occupying a position analogous to a public prosecutor, [the government attorney] is 'possessed . . . of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice.' (*Professional Responsibility: Report of the Joint Conference* (1958) 44

A.B.A.J. 1159, 1218.) The duty of a government attorney in an eminent domain action, which has been characterized as 'a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner' [citation], is of high order." (Id. at p. 871.)

Similarly, the abatement of a public nuisance involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes. And when an establishment such as an adult bookstore is the subject of the abatement action, something more is added to the balance: not only does the landowner have a First Amendment interest in selling protected material, but the public has a First

Amendment interest in having such material available for purchase. Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated.

Public nuisance abatement actions share the public interest aspect of eminent domain and criminal cases, and often coincide with criminal prosecutions. These actions are brought in the name of the People by the district attorney or city attorney. (Code Civ. Proc., § 731.)[3/] A person who maintains or commits a public nuisance is guilty of a misdemeanor. (Pen. Code, § 372.) "A public or common nuisance . . . is a

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[3/] Clancy relies on an Indiana authority, Sedelbauer v. State (Ind.App. 1984) 455 N.E.2d 1159. In that case, however, the court approved the assistance of a private attorney only because he appeared "not in place of the State's duly authorized counsel." (Id., at p. 1164.)

species of catch-all criminal offense, consisting of an interference with the rights of the community at large . . . . As in the case of other crimes, the normal remedy is in the hands of the state." (Prosser & Keeton, the Law of Torts (5th ed. 1984) p.618; see also Board of Supervisors v. Simpson (1957) 36 Cal.2d 671, 672-675.) A suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney.[4/]

[4/] Although Clancy prepared the ordinance for the City, and used a personal employment contract he had prepared for other cities, it appears he may have little discretion in the decision whether to bring an action under the public nuisance ordinance; he does so at the direction of the city council. However, as we emphasized in the criminal arena, "the prosecutor's discretionary functions are not confined to the period before the filing of charges. . . . [W]hile the trial judge has the power to prevent actual prosecutorial misconduct in court, within those bounds the district attorney possesses the advocate's traditional

Thus we hold that the contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action. In the interests of justice, therefore, we must order Clancy disqualified from representing the City in the pending abatement action.[5/]

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ability to conduct his case in the manner he elects. [Citations] A district attorney may thus prosecute vigorously, but both the accused and the public have a legitimate expectation that his zeal, as reflected in his tactics at trial, will be born of objective and impartial consideration of each individual case." (People v. Superior Court (Greer), supra, 19 Cal.3d 255, 267.)

[5/] Code of Civil Procedure section 731 provides in part that "A civil action may be brought in the name of the people of the State of California to abate a public nuisance . . . by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists . . . ." The Ebels maintain this provision makes it improper for the City instead of the State to bring this suit. But cities have long maintained public nuisance actions. (See County of Sierra v. Butler (1902) 136 Cal. 547.) In section 731 the legislature meant to allow cities, as well as the state, to continue to

Let a writ of mandate issue directing the court to vacate its order that Thomas Ebel need not produce the magazines listed in the subpoena, and issue a new order enforcing the subpoena and dismissing Clancy as the City's attorney in the pending action. In all other respects the petition is denied.

MOSK, J.

WE CONCUR:

BIRD, C.J.
KAUS, J.
BROUSSARD, J.
REYNOSO, J.
GRODIN, J.
LUCAS, J.

Footnote continued from preceding page:

bring such actions: the statute gives district attorneys and city attorneys the concurrent right to file such suits, and even provides that the city attorney "must bring" the action if directed to do so by the legislative authority of the city.

The Ebels argue further that section 731 makes it improper for Clancy instead of the official attorney of Corona to prosecute the action. The point may seem technical in this case, but could become crucial if a city council and its city attorney differed as to whether a nuisance action should be brought. Thus on remand the action herein should be brought in the name of Dallas Holmes, the Corona City Attorney. The City may hire Clancy to represent Holmes. (Gov. Code, § 37103.)

APPENDIX "B"

PETITION FOR REHEARING IN PEOPLE EX REL. CITY ATTORNEY OF CORONA, ET AL. V. SUPERIOR COURT OF THE STATE OF CALIFORNIA

(Reference: Petition at pg. 2)

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE ex rel. JAMES J. CLANCY,
as City Attorney, etc., et al.,

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

HELEN E. EBEL et al.,

Real Parties in Interest.

HELEN E. EBEL et al.,

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

THE PEOPLE ex rel. JAMES J. CLANCY,
as City Attorney, etc., et al.,

Real Parties in Interest.

L.A. 32041

Superior Court No. 160775

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioners, People of the State of California on relation of the City Attorney of Corona, California, and City of Corona, a municipal corporation respectfully petition for a rehearing in the above-entitled cause to reconsider the decision of this Court, filed on September 16, 1985, on the grounds that the decision is erroneous in that:

(1) The opinion of the Court contains material misstatements of law and fact which have caused the Court to arrive at an erroneous result.

(2) The opinion has failed to address several issues and arguments which arose at oral argument on June 12, 1985 and, in doing so, has ignored an entire line of constitutional questions involving due process and equal protection of the law, and the doctrine of separation of powers.

(3) The opinion has failed to answer the narrow question which was presented by the

> Petition for Writ of Mandate herein, which was based on U.S. v. Doe. In deciding the petition on its own grounds, the Court has assumed the existence of material facts which are not in evidence and which contradict the record.

INTRODUCTION

In its petition for writ of mandate, filed on May 1, 1984, Petitioners, People of the State of California on relation of the City Attorney of Corona, California and City of Corona, a municipal corporation, presented a single question which was stated as follows at page 13 of the petition:

> " QUESTION PRESENTED
>
> " Whether, under recognized principles of general law or waiver, a person called as a witness at a hearing on a motion for a preliminary injunction can be compelled under a subpoena duces tecum to produce 262 magazines where:
>
> " (A) the identity and existence of the 262 magazines has previously been established by a declaration in support of

> the issuance of the subpoena, and
>
> " (B) there is a showing by independent evidence that such magazines at the time of service were in the possession of such witness in a representative capacity and for the purpose of offering the same to the public for sale at the "Book Store" as a part of a commercial venture, and
>
> " (C) the preliminary injunction hearing was originated by the City of Corona under a claim of damage to public morals, and in response to a challenge of the operator of the "Book Store" that she has a right to continue offering such magazines for sale at the "Book Store" pending the determination of a public nuisance abatement (Obscenity) lawsuit arising out of such possession for sale."

On May 23, 1984, The Court of Appeal issued its alternative writ, which required the Court to show cause why it should not issue a new order denying the Defendants' motion for protective orders and quashing the subpoena duces tecum.

In its return to the alternative

writ, the Real Parties in Interest filed an Answer and Cross-Petitioned for its own Petition for Writs of Mandate and Prohibition, seeking the following relief (see Return at page 10):

> " Cross-Petitioners THE BOOKSTORE, HELEN E. EBEL, and THOMAS CHARLES EBEL, by this verified Petition for Writs of Mandate and Prohibition, seek;
>
> " A. A Writ of Mandate ordering respondent Superior Court of the State of California for the County of Riverside to set aside and vacate its orders of April 20, 1984 which denied their Motion to disqualify attorney James J. Clancy and which granted Plaintiffs' Motion to amend their First Amended and Supplemental Complaint, and seek
>
> " B. Writs of Prohibition
>
> " 1. Restraining respondent Court from permitting Plaintiffs to proceed with the action to close the BOOKSTORE;
>
> " 2. Restraining respondent Court from permitting Plaintiff

THE PEOPLE OF THE STATE OF CALIFORNIA to proceed with this action

" (a) without Dallas Holmes, the City Attorney of Corona, and

" (b) with James J. Clancy and;

" 3. Restraining respondent Court from permitting Plaintiff CITY OF CORONA to proceed with this action."

On July 5, 1985, Petitioners filed a Replication in which they demurred to the Cross-Petition of the Return to the Petition for Writ of Mandate.

On July 24, 1984, the Court of Appeal set the case for arguments on September 5, 1984 and entered an order reading in part:

> "Argument will relate only to the merits of the original petition and response thereto. The request to file cross-petitions is denied."

On September 5, 1984, the Court heard oral argument on the issues raised in the cross-petition as a part of the affirmative defenses of the Real Parties in Interest. On November 15, 1984, the Court filed its opinion granting the Peremptory Writ. In its opinion, the Court of Appeal ruled against the affirmative defenses of the Real Parties in Interest.

On December 19, 1984, the Real Parties in Interest filed a Petition for Hearing in this Court in which they argued that the Court of Appeal decision was in conflict with People v. DeRenzy, 275 Cal.App.2d 380 (1969) and with the U.S. Supreme Court ruling in United States v. Doe, ___ U.S. ___, 79 L.ed.2d 552 (1984).

In its Answer to the Petition for Hearing, filed on January 4, 1985, Petitioners argued that under the trial facts, Fisher v. U.S., 425 U.S. 391 and U.S. v. Doe, ___ U.S. ___, 79 L.Ed.2d

552 were squarely in point and controlled, and that: "The Court of Appeal's opinion is not in conflict with DeRenzy. DeRenzy is simply inapposite". (Our emphasis). See Petitioners' Answer at page 7, lines 26-27.

Due to the procedure formerly followed by this Court on petitions of this nature, the arguments before this Court on June 12, 1985 were inverted. Although the Real Parties in Interest were "appealing" the adverse decision of the Court of Appeal, this Court's granting of the petition for hearing placed Petitioners, rather than the Real Party in Interest, in the role of opening the argument before this Court, as if they were petitioning for the Writ of Mandate in the first instance. As soon as Petitioners' counsel had started his argument for issuance of the writ, based on U.S. v. Doe, the members of this Court interrupted those arguments and for 30 minutes raised numerous questions regarding the affirmative defense issue of the Real Parties in Interest relating to the contingency fee issue. As a result, Petitioners' argument on the "Question Presented" in their application for the writ was never presented orally.

Petitioners' responses to the questioning by members of this Court at oral argument did, however, place before the Court a number of constitutional issues which had not appeared in the written briefs. Those arguments do not appear in the written briefs because the Court of Appeal did not allow the Real Parties in Interest to file a Cross-Petition. Petitioners contend that the constitutional issues raised at the oral arguments are substantial and that the Court's failure to address those issues is error.

During the opposition oral arguments, the attorney for the Real Parties in Interest made several material misstatements of fact regarding the April 20, 1984 hearing before Judge Hennigan on Plaintiffs' motion to amend the complaint. In those arguments, Real Party in Interest failed to inform the Court that the record reflected that Judge Hennigan on April 20, 1984 had made specific findings of fact that: (1) the City Attorney had given his approval to the amendment, and (2) that the Petitioners' counsel was representing the City Attorney of the City of Corona and that the amendment was being allowed for that reason. In rebuttal, Petitioners' counsel noted the time constraints and lack of opportunity to respond occasioned by the sustained questioning by this Court, but called the Court's attention to the misrepresentations of opposing counsel and requested the Court to examine the record in that regard. (See the "record" at Exhibit 9 to the petition for writ of mandate, Reporter's transcript for April 20, 1984 at pages 1-4.)

REASONS FOR GRANTING A REHEARING

1.

(A) THE DECISION OF THIS COURT IS PREMISED UPON A FUNDAMENTAL MISSTATEMENT OF FACT ARISING OUT OF A MISREPRESENTATION OF OPPOSING COUNSEL AT ORAL ARGUMENT ON JUNE 12, 1985.

The decision of this Court is premised upon a fundamental misstatement of fact arising out of a misrepresentation of opposing counsel at oral argument that: (1) the City Attorney had not given his approval to the amendment, and (2) that the Petitioners' counsel was not representing the City Attorney of the City of Corona. That misrepresentation of opposing counsel was brought to the Court's attention by Petitioners' counsel at the close of oral argument on June 12, 1985.

The opinion at page 4, lines 5-7 makes the following material misstatement in its recitation of the Statement of Facts on record:

> "The court allowed the City to amend its complaint by substituting 'City Attorney of Corona' as Clancy's title in the action."

The above statement of fact should read:

> "The City moved to amend its complaint and the court, on April 20, 1984, upon a specific finding that (a) the City Attorney had given his approval to the amendment, and (2) that the Plaintiff in the action was representing the City Attorney of the City of Corona, allowed the City to amend its complaint by substituting the words, 'People of the State of California on the relation of the City Attorney of Corona, California' for the words, 'People of the State of California ex rel. James J. Clancy, as Special Attorney for the City of Corona, California'".

1.

(B) THE DECISION OF THIS COURT IGNORES THE FINDING OF FACT OF JUDGE HENNIGAN ON APRIL 20, 1984 THAT: (1) THE CITY ATTORNEY HAD GIVEN HIS APPROVAL TO THE AMENDMENT; AND (2) THAT ATTORNEY CLANCY WAS REPRESENTING THE CITY ATTORNEY OF THE CITY OF CORONA.

The decision of this Court ignores the Finding of Fact of Orange County Superior Court Judge Hennigan on Petitioners' Motion to Amend the Complaint on April 20, 1984 that: (1) the City Attorney had given his approval to the amendment; and (2) that Attorney Clancy was representing the City Attorney of the City of Corona. Judge Hennigan granted the motion to amend the complaint on April 20, 1984 because he found those facts to be true. The record, in that regard, appears at pages 1-6 of Exhibit 9 to Petitioners' Petition for Writ of Mandate, being the Reporter's Transcript of said hearing on April 20, 1984. The specific Finding of

Fact appears at page 4, line 26 through page 5, line 12. Because it is crucial to this Petition for Rehearing, pages 1-6 are reproduced hereinafter in full:

> "PROCEEDINGS OF APRIL 20, 1984
>
> "(PEOPLE OF THE STATE OF CALIFORNIA
> "VS THE BOOKSTORE, CASE NO. 160755.)
>
> " THE COURT: PEOPLE VERSUS THE BOOKSTORE.
>
> " MR. CLANCY: JAMES J. CLANCY FOR THE PEOPLE. CAROL CLANCY ALSO FOR THE PEOPLE, YOUR HONOR.
>
> " MR. DIAMOND: ROGER DIAMOND; HECHT DIAMOND AND GREENFIELD FOR THE DEFENDANTS.
>
> " THE COURT: FIRST WE OUGHT TO TAKE UP THE MATTER OF THE CHANGE OF NAME OR AN AMENDMENT. IT'S MY INTENTION TO GRANT THAT. YOUR INTENTION IS BECAUSE THE CITY ATTORNEY IS NAMED INSTEAD OF THE NAMING AS AN INDIVIDUAL, DALLAS HOLMES.
>
> " MR. DIAMOND: OUR POSITION IS WE DON'T BELIEVE DALLAS HOLMES WHO IS THE CITY ATTORNEY OF CORONA HAS AUTHORIZED THIS LAWSUIT OR IS WILLING TO PERMIT HIS NAME TO BE ASSOCIATED WITH IT, PRIMARILY BECAUSE THE LAWSUIT IS NOT BASED UPON LAW AND MAKES CONTENTIONS THAT ARE CONTRARY TO ESTABLISHED CASE LAW IN CALIFORNIA.

" WE BELIEVE THAT OUR MEMORANDUM OF POINTS AND AUTHORITIES PUT MR. CLANCY ON NOTICE. THIS WAS OUR CONTENTION, AND HE HAS HAD AN OPPORTUNITY TO SECURE SOME SORT OF WRITTEN APPROVAL FROM MR. HOLMES AND HAS NOT BEEN ABLE TO GET IT.

" IF MR. CLANCY WERE ABLE TO GET MR. HOLMES' APPROVAL, THERE WOULD BE NO PROBLEM. MR. HOLMES' NAME SHOULD APPEAR ON THE PLEADINGS. HE'S BRINGING THE ACTION ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA.

" MR. CLANCY IS NOT ABLE TO GET HIS APPROVAL. THAT'S OUR POSITION, AND WE BELIEVE THE NAME SHOULD APPEAR. IT'S NOT SIMPLY A TECHNICAL OBJECTION, BUT IT GOES TO THE HEART OF THE MATTER, BECAUSE WE DON'T BELIEVE THIS ACTION IS BEING PROSECUTED BY THE RIGHT PARTY, A FUNDAMENTAL OBJECTION, NOT A TECHNICAL DEFECT.

" WE BELIEVE MR. HOLMES SHOULD APPEAR AS THE ATTORNEY, OR HAVE HIS NAME APPEAR ON THE PLEADINGS, AND AUTHORIZE MR. CLANCY TO APPEAR IN HIS BEHALF.

" WHAT WE THINK HAS HAPPENED HERE, YOUR HONOR, IS WE BELIEVE THE CITY COUNCIL OF THE CITY OF CORONA MAY HAVE AUTHORIZED MR. CLANCY TO BRING THIS ACTION, BUT THAT THE CITY COUNCIL CAN DO THAT -- UP TO THE CITY ATTORNEY ACCORDING TO 731 OF THE CODE OF CIVIL PROCEDURE.

" IT'S A CRITICAL PROBLEM, BECAUSE THE CITY MAY NOT MAINTAIN THE ACTION. IT IS THE CITY ATTORNEY WITH THE APPROVAL OF THE CITY. THE CITY COUNCIL HAS BY-PASSED MR. HOLMES AND HAS TRIED TO GET SOME SPECIAL COUNSEL, WHO PROBABLY SOLICITED THIS CASE, ACCORDING TO THE EVIDENCE THAT WE'VE BEEN ABLE TO GATHER TO BRING THIS ACTION.

" WE THINK IT CRITICAL, AND IF MR. CLANCY HAS MR. HOLMES APPROVAL, ALL WE HAVE TO DO IS HAVE A STATEMENT FROM MR. HOLMES TO THAT EFFECT, AND WE DON'T HAVE IT.

" THE COURT: MR. DIAMOND, I RESPECT BOTH YOU AND MR. CLANCY AS I DO OTHER COUNSEL THAT APPEAR HERE. I THINK WHEN AN ATTORNEY APPEARS AND FILES AN ACTION, HE'S MAKING A REPRESENTATION TO THE COURT THAT HE HAS THE AUTHORITY OF HIS CLIENT TO REPRESENT THE CLIENT.

" MR. DIAMOND: MR. CLANCY, I THINK, BELIEVES HIS CLIENT IS THE CITY OF CORONA, AND THAT IS HIS CLIENT. WHEREAS, IN FACT, ACCORDING TO 731 OF THE CODE OF CIVIL PROCEDURE, THIS KIND OF AN ACTION HAS TO BE BROUGHT BY THE CITY ATTORNEY AND IN THE NAME OF THE PEOPLE OF THE STATE OF CALIFORNIA, NOT BY THE CITY COUNCIL HIRING AN OUTSIDE COUNSEL.

" THE COURT: BUT IT IS TRUE IT IS BROUGHT IN EFFECT FOR THE BENEFIT OF THE CITY. I DON'T THINK IN ANY OF THE CASES THE CITY ATTORNEY IS EXPECTED TO REACH INTO

HIS OWN POCKET AND PAY A PRIVATE ATTORNEY TO REPRESENT HIM IN THE MATTER, AND SO I THINK YOUR REMEDY HERE, IF YOU FEEL MR. HOLMES IS REFUSING, SHALL WE SAY, TO LET HIS NAME BE USED, YOU CAN TAKE HIS DEPOSITION.

" IN THE ABSENCE OF THAT, I THINK I HAVE TO ACCEPT COUNSELS' INNATE REPRESENTATION IN THE FILING OF THE SUIT THAT HE'S REPRESENTING THE CITY ATTORNEY OF THE CITY OF CORONA.

" MR. DIAMOND: PERHAPS WE CAN ASK MR. CLANCY, AS AN OFFICER OF THE COURT, TO MAKE A REPRESENTATION ON THE RECORD THAT HE HAS BEEN SPECIFICALLY AUTHORIZED BY MR. HOLMES TO BRING IN THE ACTION ON BEHALF OF THE CITY ATTORNEY.

" THE COURT: AS FAR AS I AM CONCERNED, WHEN HE FILES AN ACTION ON BEHALF OF THE CITY OF CORONA, HE'S MAKING THAT REPRESENTATION.

" AGAIN, IF MR. HOLMES DEPOSITION IS TAKEN, HE REPUDIATES MR. CLANCY'S REPRESENTATION, THAT MAYBE SOMETHING ELSE. AGAIN, IT MAY BE A QUESTION OF WHETHER THE DEGREE TO WHICH A CITY ATTORNEY, OR ANY ATTORNEY, HAS TO TAKE THE ORDER OF HIS CLIENT, IN THIS CASE THE CLIENT IS THE CITY OF CORONA, CITY COUNCIL TO MR. HOLMES, THOUGH SHOULD BRING THIS ACTION.

" SO ULTIMATELY, IT HAS TO BE BROUGHT IN THE NAME OF THE CITY ATTORNEY UNDER THE CODE. I THINK ULTIMATELY THE TRUE PARTY IN

INTEREST IS THE CITY, OR AS THE WORDING OF IT MAY STATE, THE PEOPLE OF THE STATE, BUT THE PEOPLE OF THE STATE, PARTICULARLY IN THAT PART.

" SO I AM GOING TO GRANT THAT, GRANT HIS MOTION TO SUBSTITUTE THE NAME. I FIND NOTHING THAT SAYS HE HAS TO NAME THE INDIVIDUAL CITY ATTORNEY, RATHER THAN JUST SIMPLY DESIGNATING HIM BY TITLE, BECAUSE HE'S DESIGNATED BY TITLE IN THE CODE SECTION, AND OBVIOUSLY, YOU COULD HAVE A SECTION WHERE AN ELECTION WOULD OCCUR AND GET A CHANGE IN THE CITY ATTORNEY, AND THERE SHOULD BE NO NEED TO CHANGE THAT.

" DO YOU WISH TO RESPOND TO THAT?

" MR. CLANCY: YES, YOUR HONOR.

" I WOULD LIKE TO SAY THAT IN HIS POINTS AND AUTHORITIES, MR. DIAMOND, PAGE 5, LINES 25 TO 28, MAKES THE FOLLOWING ARGUMENT AND SAID: 'DURING ARGUMENT, COUNSEL FOR THE DEFENDANTS STATED THAT MR. DALLAS HOLMES WAS UNWILLING TO BRING THIS ACTION. THIS STATEMENT HAS APPARENTLY BEEN PROVEN CORRECT'. I WOULD OBJECT TO THE MANNER IN WHICH THE DEFENDANT'S COUNSEL IS MAKING REPRESENTATIONS TO THE COURT.

" IF HE HAD ANY KNOWLEDGE TO THAT EFFECT, HE SHOULD HAVE FILED A DECLARATION AND NOT TO HAVE MADE A STATEMENT, POSITIVE STATEMENT THAT THIS IS EVIDENCE.

" THE COURT: THESE ARE ALL MATTERS OUTSIDE OF THE RECORD HERE.

" MR. CLANCY: I MAKE THE REPRESENTATION TO THE COURT THAT THE AMENDMENTS HAVE BEEN SUBMITTED TO DALLAS HOLMES. I TALKED TO DALLAS HOLMES THIS MORNING AND MADE KNOWN TO HIM THE ARGUMENT MR. DIAMOND WAS GOING TO MAKE, AND HE SAID "HE CAN'T MAKE THAT KIND OF AN ARGUMENT. I HAVE SEEN THE AMENDMENT, AND I STATED I HAVE NO OBJECTIONS", AND --

" THE COURT: HE CAN MAKE THE ARGUMENT, HE'S MADE IT. IT HASN'T SOLD SO FAR.

" MR. CLANCY: THAT'S THE REPRESENTATION I AM MAKING, THAT I TALKED ON A PHONE CONVERSATION WITH THE CITY ATTORNEY THIS MORNING, AND I MADE KNOWN TO HIM THE ARGUMENT THAT COUNSEL WAS GOING TO MAKE THIS MORNING, NOTWITHSTANDING THE AMENDMENT WHICH HAS BEEN FILED.

" THE COURT: I WILL ORDER THE AMENDMENT TO PROCEED, BECAUSE THAT'S ONE THING THAT BOTHERED ME BEFORE.

" NOW COMES THE QUESTION OF THE SUBPOENA DUCES TECUM.

" MR. DIAMOND: BEFORE WE GET TO THAT, CAN I ASK THE COURT ONE QUESTION?

" THE FORMAT OF MR. CLANCY'S MOTION WAS SIMPLY REFERRING TO CERTAIN LINES THAT SHOULD BE STRICKEN. IT SEEMS TO ME

WE SHOULD NOW HAVE A PLEADING THAT IN EFFECT ADOPTS THE INTERLINEATIONS, BECAUSE WE DON'T HAVE THAT RIGHT NOW. WE SIMPLY HAVE A MOTION THAT REFERS TO CERTAIN LINES BEING DELINEATED AND OTHER LINES BEING ADDED.

" THE COURT: I THINK PERHAPS THE EASIEST THING WOULD BE TO SUBSTITUTE A NEW FRONT PAGE WITH THE CAPTION BEING DIFFERENT.

" MR. CLANCY: YOUR HONOR, I HAVE CERTAIN INTERLINEATIONS THAT ARE MADE THROUGHOUT, WHICH ARE CONSISTENT WITH THE AMENDMENT, AND ALSO ON PREVIOUS OCCASIONS, THE AMENDMENT WAS ORDERED FILED, AS I REQUESTED, AND THE INTERLINEATIONS WERE MADE ON THE COPY ITSELF.

" THE COURT: THAT SEEMS REASONABLE TO ME. I DON'T LIKE TO GET OUR FILES THICKER. WE HAVE THEM THICK TO BEGIN WITH.

" I AM GOING TO LEAVE THAT UP TO THE CLERK. THE BEST WAY TO MAKE THE INTERLINEATIONS IS TO SUBSTITUTE THE NAME OF THE CITY ATTORNEY FOR MR. CLANCY, AS FAR AS THE MOVING PARTY MAY BE MADE.

" MR. DIAMOND: IS THIS CONSIDERED A NEW PLEADING FOR WHICH I NOW HAVE TO FILE AN ANSWER?

" THE COURT: NO, MY THOUGHT WOULD BE YOUR RESPONSE TO THE PLEADINGS BE CONSIDERED THE RESPONSE TO THE AMENDED PLEADING, WITHOUT ANY PREJUDICE TO ANY ADDITIONAL CHANGES YOU WISH TO

MAKE.

> " IF YOU WISH TO PLEAD THAT IT IS IMPROPERLY BROUGHT, AND MR. HOLMES DOES NOT CONSENT, YOU MAY SO PLEAD; OTHERWISE, TO ACCEPT ANY DECISIONS YOU WISH TO MAKE BECAUSE OF THE CHANGES, THEY MAY BE CONSIDERED AS RESPONSE TO A PRESENT --
>
> " ANY OBJECTION?"

There is no evidence in the record to support the Court's contrary conclusion. This Court's opinion has refused to grant that part of Ebel's Cross-Petition which seeks the following additional relief:

> "to compel the court to vacate its order. . . permitting plaintiffs' to amend the complaint."

(See opinion at page 4, lines 11-15, and page 17, lines 5-6). The Court's statement in that regard are misstatement of fact and law and unsupported "assumptions" by the person writing the opinion.

(C) IT IS A DENIAL OF DUE PROCESS FOR THIS COURT TO CONTRADICT JUDGE HENNIGAN'S FINDINGS AND ORDER OF APRIL 20, 1984 WITHOUT EXPLAINING WHEREIN JUDGE HENNIGAN'S ORDER WAS IN ERROR OR DIRECTING THAT SUCH ORDER BE VACATED AND ANNULED AND THE REASONS THEREFORE.

The petition for writ of mandate herein which was originally filed by Petitioners in the Court of Appeal was titled People of the State of California on the relation of the City Attorney of Corona, California; City of Corona, a municipal corporation v. Superior Court of the State of California for the County of Riverside. That titling was pursuant to the authority of Judge Hennigan's ruling on April 20, 1985 that Attorney Clancy did, in fact, represent the City Attorney of the City of Corona. The opinion of this Court filed on September 16, 1985 has changed the title of this action to The People ex rel. James J. Clancy as City Attorney; etc., et al., Petitioners v. The Superior Court of Riverside County, Respondent. Petitioners submit that it is a denial of due process of law for this Court to contradict Judge Hennigan's Order of April 20, 1984 and now rule, collaterally, that the petition for writ herein was not brought upon the relation of the City Attorney without explaining wherein Judge Hennigan's ruling was in error or directing that such ruling be vacated and annulled and the reasons therefore.

1.

(D) THE MISSTATEMENTS OF FACT AND LAW IN THE COURT'S OPINION THAT: (1) THE CITY ATTORNEY HAD NOT GIVEN HIS APPROVAL TO THE AMENDMENT TO THE COMPLAINT, AND (2) THAT ATTORNEY CLANCY WAS NOT REPRESENTING THE CITY ATTORNEY OF THE CITY OF CORONA ARE MATERIAL MISSTATEMENTS IN THAT, WITHOUT THEM, THE COURT'S ANALYSIS IS UNDERMINED AND ITS RULING THAT ATTORNEY CLANCY'S DISMISSAL IS AUTHORIZED CANNOT STAND.

The misstatements of fact and law

in the Court's opinion that: (1) the City Attorney had not given his approval to the amendment to the complaint, and (2) that Attorney Clancy was not representing the City Attorney of the City of Corona are "material" in that they constitute the singular basis for the Court's analysis and the Court's mandate "dismissing Clancy as the City's attorney in the pending action."

Petitioners submit that the contrary finding and Order of Judge Hennigan that: (1) the City Attorney had given his approval to the amendment to the complaint, and (2) that Attorney Clancy was representing the City Attorney of the City of Corona, and the terms of the written contract which specifically provide as to such employment:

" A. Employment of Attorney

City hereby agrees to employ

> attorney, for the fees hereinafter spedified, to assist the City Attorney of CITY, when and as requested by said City Attorney to do so, in connection with litigation to abate certain conditions within the CITY, determined by the Council under the provisions of Ordinance No. 1689 to be pulic nuisances, or to defend the CITY if it should be named
>
> . . .
>
> ". . . .
>
> " C. Control of Litigation
>
> ATTORNEY agrees that each and every case, suit or proceeding in which he undertakes to assist the City Attorney of CITY, as aforesaid, shall be and remain under the subject to the control and direction of said City Attorney or the City Council of CITY at all stages, and that he shall at all times keep said City Attorney informed of all matters pertaining thereto."

undermine the Court's analysis that dismissal is authorized.

Under the above written terms of the City's contract, the control and direction of the case *is* in the hands of the City Attorney, not Attorney Clancy. Further, as this Court concluded in its opinion at page 16, footnote 5:

> "Thus on remand the action herein should be brought in the name of Dallas Holmes, the Corona City Attorney. The City may hire Clancy to represent Holmes. (Govt. Code §37103)"

In this regard, Government Code § 37103 provides city councils the following specific authority:

> "§ 37103. Contracts for special services and advice: Compensation
>
> The legislative body may contract with any specially trained and experienced person, firm, or corporation for special services and advice in financial, economic, accounting, engineering, legal or administrative matters.
>
> "It may pay such compensation to these experts as it deems proper." (Our emphasis.)

1.

(E) THE COURT'S ANALYSIS PRESENTS AN IRRECONCILABLE CONFLICT BETWEEN THE COURT'S "ASSUMPTIONS" (MISREPRESENTATIONS OF OPPOSING COUNSEL AT ORAL ARGUMENT ON JUNE 12, 1985) AND THE SPECIFIC TERMS OF THE CONTRACT.

The analysis in the Court's opinion presents an irreconcilable conflict. The central issue is the construction to be given to the written contract between Attorney Clancy and the City of Corona. The Court's analysis concludes that the contingency provision is against public policy and must be set aside because Attorney Clancy is not under the control of the City Attorney of the City of Corona, yet the terms of the written contract, as noted above in Point 1.(D), define the legal relationship between Attorney Clancy and the City Attorney to be one in which Attorney Clancy is under the control of the City Attorney. At oral argument on June 12, 1985, Attorney Clancy requested this Court to examine the misrepresentations of facts and arguments of opposing counsel in the light of the specific terms of the written contract which define the contractual relationship to be entirely different from that which the "Book

Store" attorney was "arguing" to the Court.

1.

> (F) AN AUGMENTATION OF THE RECORD UPON REHEARING WILL ESTABLISH THAT ATTORNEY CLANCY, BY LETTER DATED APRIL 12, 1984 AND EIGHT DAYS PRIOR TO THE HEARING ON THE MOTION TO AMEND, TRANSMITTED A COPY OF THE PROPOSED AMENDED COMPLAINT TO CITY ATTORNEY DALLAS HOLMES WITH A PROPOSED DRAFT OF AN AMENDING RESOLUTION WHICH WAS THEREAFTER PRESENTED TO AND ADOPTED BY THE CITY COUNCIL AS RESOLUTION NO. 84-35.

Petitioners' counsel makes the following offer of proof in support of this Petition for Rehearing:

> "That if Petitioners' Petition for Rehearing is granted, and the record is augmented to include Attorney Clancy's letter of April 12, 1984 to City Attorney Dallas Holmes, said record will establish that a copy of the motion to amend the complaint and a copy of the proposed amendment to the complaint was sent to City Attorney Dallas Holmes eight days before the hearing on the motion (see copy fo amendment at Exhibit C to Real Parties in Interest Cross-Petition, on file in this Court), with a recommendation that City Attorney Dallas Holmes present to the City Council an amendment to Resolution

> 83-102, directing that the special counsel commence the action "on the relation of the City Attorney of Corona", which thereafter City Attorney Dallas Holmes did, in fact, present to the City Council and which the City Council did, in fact, pass as Resolution 84-35 (see copy at Exhibit 2 to the Replication on file in this Court).

A copy of said letter of Attorney James J. Clancy to City Attorney Dallas Holmes, dated April 12, 1984, in support of said offer of proof appears on the page following this offer of proof.

Petitioners submit that the above offer of proof confirms Attorney Clancy's representation to the trial court at oral argument on April 20, 1985, and Judge Hennigan's Finding of Fact and Order thereon on April 20, 1984, and contradicts the contrary "assumption" and innuendo, caused by opposing counsel's misrepresentations, which this Court makes throughout its opinion.

/// /// ///

B-29A

JAMES J. CLANCY
ATTORNEY AT LAW
9055 LA TUNA CANYON ROAD
SUN VALLEY, CALIF.

AREA CODE 213
352-2069

April 12, 1984

Mr. Dallas Holmes
Best, Best & Krieger
4200 Orange Street
Riverside, California 92502

Re: People of the State of California et al. v. The Book Store et al., No. 160755

Dear Dallas;

I am enclosing a copy of our motion to file an amendment to the pleadings in the Book Store case.

Diamond has stipulated to an order shortening time to set the motion for a hearing on Friday, April 20, 1984 and is being served today by mail. Judge Hennigan's office has indicated that we can get our order shortening time.

I do not anticipate any problems and believe that Judge Hennigan will grant our motion on the 20th. However, it may be well to have the City Council take specific action at its next meeting on April 18th to amend Resolution 83-102 by inserting after the word "ordered" on page 11, line 1, the words and phrases: "to commence a civil lawsuit naming as plaintiffs the City of Corona and People of the State of California, on the relation of the City Attorney of Corona, California, and".

Our Supplemental Memorandum in opposition to the motion to quash is being finalized and will be mailed to you tomorrow.

Sincerely,

James J. Clancy

JJC/cac
enclosure

2.

THE RATIONALE EMPLOYED BY THE COURT IN STRIKING THE CONTINGENCY FEE ARRANGEMENT VIOLATES DUE PROCESS AND EQUAL PROTECTION OF THE LAW GUARANTEES.

The rationale employed by the Court in striking the contingency fee arrangement violates due process and equal protection guarantees. If applied equally across the board it would preclude attorney fee awards that are regularly awarded under the private attorney general principle, C.C.P. § 1021.5, and under the civil rights attorney fee statute, 42 U.S.C. § 1988, and would preclude the employment of attorneys who work daily in the courtroom "performing tasks on behalf of and in the name of government", see opinion at page 11, under the aegis of those statutes. The private attorney-general and civil rights attorneys work under contingency fees which employ the same principles as the prototype which this Court finds is against public policy. In one of those "landmark" cases, the contingency payment was defeated by the State Legislature which refused to pay the award. In that case, it took the extraordinary power of the California Supreme Court to direct that the funds be provided to satisfy the contingency.

When this issue was addressed by Petitioners' counsel at oral argument, it was given recognition by Associate Justice Grodin in his remarks from the bench which adverred to the "Fox" case in Los Angeles. That issue, however, has not been dealt with by this Court in its opinion.

The double standard which this Court has established re moral public nuisances raises "due process" and "equal protection of the law" constitutional questions of major proportions. See, for example, the language employed in this Court's opinion at page 14, reading:

> " Similarly, the abatement of a public nuisance involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes. And when an establishment such as an adult bookstore is the subject of the abatement action, something more is added to the balance: not only does the landowner have a First Amendment interest in selling protected material, but the public has a First Amendment interest in having such material available for purchase. Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated."

and at page 7, where this Court holds:

> "Thus we may order that Clancy be dismissed from the case if we find the contingency fee arrangement prejudices the Ebels." (Our emphasis.)

Petitioners submit that, from a

constitutional standpoint, the intellectual interpretation given to the contingency fee provisions, as noted in its opinion above, does not justify the "double standard" which the Court opinion has created as to moral pubic nuisances and does violence to the doctrine of separation of powers.

2.

(A) THE COURT'S OPINION HAS FAILED TO WEIGH IN THE BALANCE THE CITY'S HISTORIC POWERS TO ABATE MORAL PUBLIC NUISANCES.

The constitutional implications here are clear-- the trial facts demonstrate a public concern as to "rights affecting the public interest" which are real: Ebel and her "Adult Book Store" (whose interest is being balanced) moved in on a residental neighborhood in the City of Corona and on the same block as a neighborhood grammar school, and the City of Corona, in attempting to exercise its historic governmental (police) powers to abate moral public nuisances, is alleging a public nuisance and undertaking a burden of proof that the state obscenity statutes (not "sexually oriented" or "adult bookstore standards" as the opinion infers are at issue) are being violated. The contract herein was well within its governmental powers to achieve that objective and is not subject to the disability set forth in this Court's opinion. On the power of a City to abate moral public nuisances, see James Phalen v. Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

> " The suppression of nuisances injurious to public health or morality is among the most important duties of government. . . It is a principle of the common law, that the king cannot sanction a nuisance."

It is a fundamental rule of the common law that "the Courts are the guardians of the public morals," Sir Charles

Sedley's Case, 1 SID 168; Rex v. Curl, 2 Strange 789 (1727). The power of Courts of Equity, in regard to public nuisances, transcends that of Courts of Law and "is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community." Mugler v. Kansas, 123 U.S. 205 at 214 (Dec. 5, 1887). See, also, Government Code §§ 38771, 38773 and 38773.5; H.G. Wood, The Law of Nuisances, §§ 23 and 24 at pages 45-46, § 32 at page 53, § 57 at page 77, § 65 at page 85, and § 743 at page 972; Joyce, Laws of Nuisances, § 345 at 498 and 507.

2.

(B) THE COURT's OPINION VIOLATES THE GOLDEN RULE OF STATUTORY CONSTRUCTION WHICH FAVORS A PRACTICAL INTERPRETATION OVER A TECHNICAL ONE.

The unreasonableness of this Court's generalized approach does not become apparent until one compares the language of the Court's opinion to the practical facts which are of record and before this Court, including the photographic exhibit attached to the affidavit of Corona Police Detective Les Scott, which demonstrates the nature of the "poisoned apple" which is being offered by Ebel on real estate adjoining the grammar school property.

The "practical facts" of record which bear on the issue of "unreasonableness" include the fact that the outside limit of the attorney fee contract is $60.00 per hour. In the prevailing market today, $60.00 per hour is below the average hourly rate for general attorney services, much less for one who specializes in a particular area of the law. In the oral arguments, the Petitioners noted this fact. Further, Petitioners direct this Court's attention to *California Attorney's Fees Award Practice* (Cont. Ed. Bar Supplement, March, 1985) at page 41, reading:

> " Other potential means for showing rate include surveys conducted by various groups. For example, Altman & Weil's 1983 Survey of Law Firm Economics indicated that billing *rates nationally averaged $69 per hour* for attorneys *with less than two years experience*, $80 per hour for two to four years experience, $95 per hour for four to five years, $114 for six to ten years, $135 for 11 to 20 years, and $140 for over 21 years. Larger firms charge approximately 20 percent more. The survey also noted that *California fees are higher* than the national average." (Our emphasis.)

in spite of the above facts, this Court's opinion alleges that:

> " In the case at bar, Clancy has an interest in the result of the case; his hourly rate *will double* if the City is successful in the litigation. Obviously this arrangement gives him an interest extraneous to his official function in the actions he prosecutes on behalf of the City." (Our emphasis.)

The above allegation, in context with

the facts, misstates the contractual relationship between Attorney Clancy and the City of Corona. To generalize as it does on the rate of $60.00 per hour (which is the outside limit of the attorney fee contract) and under these circumstances is misleading: (1) The $30.00 "hourly rate" is but half of Attorney Clancy's regular "hourly rate", and (2) it cannot be stated that under the fee agreement that the rate will increase ipso facto if Attorney Clancy is successful. Also, a contract which says that Attorney Clancy should receive a fair market return for his services if he performs successfully and less than that if he is unsuccessful, does not, in any way, infer that something wrongful or against public policy is being indulged in by Attorney Clancy or the City and, in answer to the test posed by this Court in its opinion at page 7, in no way can it be said that "the contingency fee arrangement prejudices the Ebels". Were the facts otherwise, such as were a "multiplier" factor involved, as in Blum v. Stenson, 79 L.Ed.2d 891, 104 S.Ct. 1541, the Court's generalized analysis would be more in point.

One of the additional "practical facts" of record which bears upon the "unreasonable" quality of the Court's generalized approach is the fact that the contract as applied does not function in the manner in which this Court's opinion holds is against "public policy". Although Petitioners' counsel described in detail at the oral argument the manner in which the contract functioned, and pointed out that such did not result in the abuses which some members of the Court envisioned, the Court's opinion does not respond to that issue and argument.

Realistically viewed, the $60.00 per hour fee is nothing more than a statement of the fair market value of Attorney Clancy's services. As to the City, the contract was not a contingency contract in that, under all circumstances, only $30.00 was to be paid by the City. Further, as to Attorney Clancy, the contingency provision of his fee was in the hands of the California judicial system which was in charge of administering the fee. The additional fee, if any, would only be awarded if Attorney Clancy were able to convince the trial court, at an adversary hearing at which Ebel would be the adversary, that his services were so deserving that he was entitled to a rate greater than $30.00 per hour (half his regular rate), based upon the "reasonable attorney fee" concept, and that any amount over $30.00

would be assessed by the trial court against the malefactor and not the City. For example, two conditions might arise:

(1) The City lost-- Attorney's fee sould be $30.00 per hour.

(2) The City won-- Attorney's fee would still be $30.00 per hour. At an adversary hearing on a motion for an attorney's fee under C.C. § 3496, at which California law would govern, the trial court might set the attorney's fee at $30.50 per hour, in which event, Attorney Clancy would only be paid fifty cents per hour more (not $60.00 per hour), and that amount under the state statute would be assessed against the malefactor Ebel (not the City.)

In sum, Attorney Clancy would not receive the fair market value for his services ($60.00 per hour) unless he proved to the Court that he had performed in a manner which showed himself to merit the payment for a "fair market value".

The opinion of this Court relating to the contingency fee provision is not in accord with acceptable standards of statutory construction. It has been called a golden rule of statutory interpretation that:

> "Unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result. It is a 'well established principle of statutory interpretation that the law favors rational and sensible construction'". Sutherland Statutory Construction, Sands, 4th edition, Vol. 2A at page 54.

See also, Samarkand of Santa Barbara, Inc. v. County of Santa Barbara, 216 Cal.App.2d 341, 31 Cal.Rptr. 151 (1963); Metro Realty v. County of El Dorado, 222 Cal.App.2d 508, 35 Cal.Rtpr. 480 (1963); Harris v. Alcoholic Beverage Control Appeals Board, 223 Cal.App.2d 563, 35 Cal.Rptr. 865 (1963); People v. Buzard, 38 Cal.Rptr. 63 (Cal.App. 1964); Moeser v. County of San Diego, 227 Cal.App.2d 563, 38 Cal.Rtpr. 813 (1964); People v.

One 1962 Chevrolet Bel Air, 248 Cal.App. 2d 874, 56 Cal.Rptr. 878 (1967); People ex rel. San Francisco Bay Conservation & Development Commission v. Town of Emeryville, 72 Cal.Rptr. 790, (1968). A practical interpretation is favored over a technical one. Stanley v. Justice Court of Auburn Judicial Dist., County of Placer, 55 Cal.App.3d 244, 127 Cal.Rptr. 523 (1976). See Denio v. Huntington Beach 22 Cal.2d 580 (1943), where this Court stated, in construing a similar contract for special counsel, that the contract should not be construed in a narrow and limited sense. Particularly should this be so, where a City's power to abate moral public nuisances is involved, and where to proceed otherwise would involve serious constitutional questions involving the doctrine of separation of powers and due process and equal protection of the law.

3.

THE DECISION OF THIS COURT DOES NOT ANSWER THE QUESTION PRESENTED IN PETITIONERS' PETITION FOR WRIT OF MANDATE REGARDING THE SUBPOENA DUCES TECUM. IN DECIDING THAT ISSUE ON INDEPENDENT GROUNDS, THE OPINION HAS ASSUMED FACTS WHICH ARE NOT IN EVIDENCE AND WHICH ARE CONTRARY TO THE FACTS OF RECORD.

The decision of this Court on the subpoena duces tecum issue does not answer the "Question Presented" by Petitioners. In deciding the merits of the case on independent grounds, the Court premises its decision upon two material misstatements of fact which are contrary to the record.

At page 5, lines 4-14, the Court incorrectly recites the Statment of facts of record as being:

> ". . . The parties agree that certain elements of the crime have been established by independent evidence (i.e., existence, possession, and authentication), and thus the act of producing the magazines is to that extent not 'testimonial' and 'incriminating.' (See Fisher v. United States (1976) 425 U.S. 391, 408.) However, the parties

> disagree whether the element of scienter, which must be proved in order to convict, has been established by other evidence and whether it would be established by the act of gathering the magazines and bringing them into court."

The latter sentence does not correctly state the issue which has been drawn by Petitioners' pleadings or the nature of the "disagreement" of the parties.

Further, the opinion misstates the record at page 6, lines 6-7, where it states:

> "The magazines named in the subpoena duces tecum are the property of the Book Store, an artificial entity, that cannot claim the privelege against self-incrimination."

Nowhere in the record is there any evidence to show that the magazines are the property of the Book Store or any other person or entity.

Petitioners have made only one contention in these writ proceedings and that is the "Question Presented" in its petition for writ of mandate at page 13, reading:

" QUESTION PRESENTED

" Whether, under recognized principles of general law or waiver, a person called as a witness at a hearing on a motion for a preliminary injunction can be compelled under a subpoena duces tecum to produce 262 magazines where:

" (A) the identity and existence of the 262 magazines has previously been established by a declaration in support of the issuance of the subpoena, and

" (B) there is a showing by independent evidence that such magazines at the time of service were in the possession of such witness in a representative capacity and for the purpose of offering the same to the public for sale at the "Book Store" as a part of a commercial venture, and

" (C) the preliminary injunction hearing was originated by the City of Corona under a claim of damage to public morals, and in response to a challenge of the operator of the "Book Store" that she has a right to continue offering such magazines for sale at the "Book Store" pending the determination of a public nuisance abatement (Obscenity)

> lawsuit arising out of such possession for sale."

Petitioners' arguments under the above narrow question is that the facts which are of record show that U.S. v. Doe, supra, and Fisher v. U.S., supra, are squarely in point and are controlling and that any person in charge of the premises when served with the subpoena duces tecum to produce magazines which have been established by evidence aliunde as: (1) being in existence, and (2) being in his possession, and (3) authenticated as the subject matter under litigation in the lawsuit, must produce such evidence. Bellis v. U.S., 417 U.S. 85, cited by the opinion at page 6, lines 1-3, is clearly not in point or controlling on the above Question and stated facts.

Under the above argument, Petitioners contend that under U.S. v. Doe, supra, the element of "scienter", is inapposite. See Answer to Petition for Hearing at page 7, line 25 through page 9, line 28). Contrary to the above Statement of Facts in this Court's opinion, Petitioners did not join issue with the Real Parties in Interest in their claim that the issue of "scienter" was pertinent. Petitioners contension is and was that "scienter" was inapposite to the issue which was being presented to the Court.

Petitioners submit that this Court has the undoubted right to decide the merits of the case on its own grounds, but may not if it must assume facts which are not in evidence to accomplish that result.

4.

THE OPINION OF THIS COURT MAKES SEVERAL ADDITIONAL MISSTATEMENTS OF FACT.

At page 3, lines 6-10, the opinion states:

> ". . . Clancy had drafted this and the previous ordinances relating to the sale of sexually explicit material, and had presented them for consideration by the City Council. He is associated with an organization entitled Committee for Decency through Law."

The "previous ordinances relating to the sale of sexually explicit material" were not drafted by Attorney Clancy, nor did he present them to the City Council for consideration, nor did he recommend the adoption of such an ordinance relating to the sale of sexually explicit material except in conjunction with the adoption of a second public nuisance abatement ordinance setting forth a specific procedure for the abatement of obscene subject matter which is in derogation of State law.

Attorney Clancy is not associated with an organization entitled "Committee" for Decency Through Law but does perform legal services for a non profit corporation known as "Citizens for

Decency through Law, Inc.", an Ohio corporation, under a retainer agreement.

At page 3, lines 11-14, the opinion states:

> " . . . Following an investigation by the police department, the City adopted a resolution declaring the Book Store to be a public nuisance and revoking its business license. . ."

The above statement is incomplete and, as such, is a misstatement of fact. The incomplete nature of the statement suggests an infirmity in the ordinance under existing case law. The statement of fact should include the following additional statement to remove the innuendo:

> "The revocation of business license was subject to confirmation by the Riverside County Superior court in judicial proceedings to abate the place as a public nuisance which was required by such ordinance. Criminal proceedings for transacting business without a license arising out of the licence revocation were not authorized until the City Council's order of license revocation had been confirmed by a judicial order of

the Riverside County Superior Court. (See section 2 of Resolution No. 83-102.)

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge this Court to grant the Petition for Rehearing and issue a second opinion which takes into consideration the above objections, or dismiss the Petition for Hearing of the Real Parties in Interest as improvidently granted, and order the decision of the Court of Appeal to be published.

DATED: October 1, 1985

Respectfully submitted,

JAMES J. CLANCY
Attorney for Petitioners.

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APPENDIX C

DER OF CALIFORNIA SUPREME COURT DENYING REHEARING
DIFICATION OF OPINION REMITTITUR, FILED
VEMBER 20, 1985 . . . . C1-C6

eference: Petition at page)

Order Due
December 13, 1985
SUPREME COURT
FILED
NOV 20 1985
LAURENCE P. GILL, CLERK

DEPUTY

ORDER DENYING REHEARING

L.A. No. 32041

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

THE PEOPLE EX REL. CLANCY, ETC., ET AL.,

Petitioners

v.

THE SUPERIOR COURT OF THE COUNTY OF RIVERSIDE, Respondent;
EBEL ET AL., Real Parties in Interest

(AND COMPANION CASE)

Opinion modified. Petition for rehearing DENIED.

BIRD
Chief Justice

SUPREME COURT
FILED
NOV 20 1985
LAURENCE P. GILL, Clerk

Deputy

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

HELEN E. EBEL et al.,

Real Parties in Interest.

HELEN E. EBEL et al.

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,

Real Parties in Interest.

L.A. 32041

Super.Ct. 160775

MODIFICATION OF OPINION

BY THE COURT:

The above entitled opinion, filed September 16, 1985, is modified as follows:

Page 3, lines 6-10, are deleted.

Page 15, footnote 4, lines 1-3, are deleted and replaced with the following: "It appears that attorney Clancy may have had little [rest of footnote unchanged]."

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

REMITTITUR

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

HELEN E. EBEL et al.,

Real Parties in Interest.

HELEN E. EBEL et al.

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,

Real Parties in Interest.

No. LA 32041

Appeal

County Riverside

Superior Court No. 160755

The above-entitled cause having been heretofore fully argued, and submitted, It Is Ordered, Adjudged, and Decreed by the Court:

Let a writ of mandate issue directing the court to vacate its order that Thomas Ebel need not produce the magazines listed in the subpoena, and issue a new order enforcing the subpoena and dismissing Clancy as the City's attorney in the pending action. In all other respects the petition is denied.

I, Laurence P. Gill, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 16th day of September, 1985.

Witness my hand and the seal of the court this 20th day of November, 1985.

(SEAL)

Laurence P. Gill
Clerk
By KENNETH A. WAGOVICH
Deputy

APPENDIX D

OPINION OF COURT OF APPEAL, FOURTH DISTRICT, DIVISION TWO, FILED ON NOVEMBER 15, 1984, IN PEOPLE OF THE STATE OF CALIFORNIA V. SUPERIOR COURT, RIVERSIDE COUNTY; THE "BOOK STORE," ETC., ET AL., REAL PARTY IN INTEREST . . . .

(Reference: Petition at page)

FILED
Keenan G. Casady, Clerk
NOV 15 1984
COURT OF APPEAL
FOURTH DISTRICT

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTIRCT

DIVISION TWO

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

PETITIONER,

v.

SUPERIOR COURT, RIVERSIDE COUNTY,

RESPONDENT;

THE "BOOK STORE," etc, et al.,

Real Party in interest.

E000934

(Super.Ct.No.160775)

OPINION

ORIGINAL PROCEEDING; application for a writ of mandate. J. David Hennigan, Judge. Writ granted.

James J. Clancy for Petitioners, City Attorney of Corona, California, and City of Corona.

Hecht, Diamond & Greenfield and Roger Jon Diamond for Real Parties in Interest Helen E. Ebel and Thomas Charles Ebel.

No appearance for Respondent.

In this petition for writ of mandate, petitioners, the State of California on relation of the City Attorney of Corona and the City of Corona (city), appeal from an order granting the motion of real parties in interest, the "Book Store," Helen E. Ebel, Thomas Charles Ebel and Eugene Van Zee, to quash a subpoena duces tecum in an action to abate a public nuisance.

The essential facts are not in dispute. On June 15, 1983, the city adopted an ordinance setting forth procedures for the abatement of certain types of public nuisances in the city. The ordinance defined as a public nuisance: "Any and every place of business in the City . . . in which obscene publications constitute all of the stock in trade, or a principal part thereof . . ." Two weeks earlier, when the ordinance was originally introduced, the city had retained the services of James J. Clancy, a private attorney, to represent the city in any lawsuits brought pursuant to the aforesaid public nuisance ordinance.

Petitioners, represented by Mr. Clancy, shortly thereafter filed a complaint against the real parties in interest for abatement of a public nuisance, declaratory judgment and an injunction. Petitioners dispatched several police officers to the "Book Store" for the purpose of photographing the literature on sale in the retail section of the store and the motion picture films on exhibit in the "arcade" section. The officers photographed some 262 different magazines and books. The photographs together with a declaration by the police officer in charge of the surveillance operation were filed with the respondent superior court in support of petitioners' motion for a preliminary injunction.

Shortly thereafter, petitioners served a subpoena duces tecum upon real parties in interest demanding the production of the aforesaid 262 publications as evidence in support of a preliminary injunction that obscene materials were being offered for sale. Although the subpoena was originally served upon Timothy Groover, the clerk in charge of the store, the parties by stipulation have deemed the subpoena to have been served upon real party in interest Thomas E. Ebel.

Real parties in interest moved to quash the subpoena duces tecum and to disqualify petitioners' counsel, Mr. Clancy. After a hearing on the motions, the trial court permitted petitioners to amend the complaint by deleting Mr. Clancy's name as relator and substituting "the City Attorney of Corona." The trial court granted the motion to quash the subpoena duces tecum on the grounds that the materials requested were privileged under the Fifth Amendment. Petitioners then filed this action seeking to overturn the order of the trial court on the grounds that the materials were not protected by the Fifth Amendment privilege against self-incrimination. We issued an alternative writ of mandate. After further briefing and oral argument, we have determined to issue a peremptory writ.

DISCUSSION

Before turning to the substantive merits of the petition, we must first address certain procedural issues. Real parties assert several "affirmative defenses" to the petition challenging the qualifications of petitioner's counsel, James J. Clancy.

First, real parties contend that the petition should be dismissed because the underlying public nuisance action was brought on the relation of Mr. Clancy rather than Mr. Dallas Holmes, the City Attorney of Corona. Code of Civil Procedure section 731 provides in part: "A civil action may be brought in the name of the People of the State of California to abate a public nuisance . . . by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists . . . and such district attorney or city attorney . . . must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city."

The record in the case sub judice reveals that the trial court permitted petitioners to amend the complaint by substituting for "James J. Clancy" as relator "the City Attorney of Corona." Mr. Clancy had earlier signed a contract with the city agreeing to conduct the lawsuit "as an independent contractor and not an officer or employee of [the] City." Prior to the substitution, the city adopted a resolution authorizing Mr. Clancy to conduct the lawsuit in the name of the "City of Corona and People of the State of California, on the relation of the City Attorney of Corona, California . . . ."

Notwithstanding the amendment, real parties in interest appear to argue that Code of Civil Procedure section 731 requires that the lawsuit be conducted by the city attorney in deed as well as in name. However, real parties cite no authority and offer no persuasive rationale in support of this proposition. Hence we conclude that petitioners have fully complied with the provisions of Code of Civil Procedure section 731 by bringing the lawsuit on the relation of the "City Attorney of Corona" pursuant to the express authorizaton of the City Council of Corona.

Real parties next contend that the petition should be dismissed because of a contingency fee arrangement between the city and Mr. Clancy.[1] They argue that the underlying action to abate a public nuisance is analogous to a criminal prosecution, and that like a public prosecutor Mr. Clancy's primary goal should be to obtain justice, not victory. The contingency fee arrangement, it is argued, creates a conflict between Mr. Clancy's private financial interest and the public interest which he represents.

We do not find the analogue to be persuasive. Obviously, a public prosecutor must be absolutely neutral. The life or liberty of an accused hangs in the balance. The state's object is not to win or lose, but to ascertain the truth and to do justice. However, in neither their Answer to the Petition nor their responses at oral argument have real parties identified any equally compelling interests at stake in this civil action to abate a public nuisance which would require the same absolute neutrality on the part of the city's attorney.

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[1] Actually, under the terms of the agreement, Mr. Clancy receives an hourly fee regardless of the result of the lawsuit. The hourly fee doubles if the lawsuit is successful. Thus it is the amount, not the very existence, of the fee which is contingent upon the outcome.

The only relevant noncriminal case cited by real parties, City of Los Angeles v. Decker (1977) 18 Cal.3d 860, involved an eminent domain action. In holding that the city attorney had acted improperly in withholding certain evidence concerning the value of the subject property, the Decker court noted that the duty of the condemner in an eminent domain action is of a "quasi-judicial" nature; the government must "strike a just balance between the economic interests of the public and those of the landowner," and the duty of the government's attorney is accordingly of a "high order." (Id., at p. 871.)

Clearly, where the nature of the civil action itself is of a "quasi-judicial" nature, we may fairly demand the same absolute neutrality on the part of a city attorney that we demand of a criminal prosecutor. However, where the civil action undertaken by the government lacks this special "fairness" element, we perceive no reason in logic or public policy for broadly holding that attorneys who represent the public may not be employed on a contingency fee basis. The issue is one that must be decided by reference to the particular facts and circumstances of each case. Here real parties have offered no persuasive rationale for finding that the contingency fee arrangement compromises Mr. Clancy's ability to represent fairly the interests of the public, including real parties. Nor do we perceive any. Therefore we decline either to disqualify Mr. Clancy as counsel for the city or to dismiss the petition.

Lastly, real parties contend that the petition must be dismissed because the underlying action was brought in the name of the City of Corona as well as the State of California. In support of this contention, real parties cite Code of Civil Procedure section 731, which authorizes county and city attorneys to bring public nuisance actions "in the name of the People of the State of California." However, real parties have referred us to no authority, nor have we found any, which precludes the city from being a party to the action. Under the common law, both cities and counties have long maintained actions to abate a public nuisance. (See County of Sierra v. Butler (1902) 136 Cal. 547, 550-551;

San Francisco v. Buckman (1896) 111 Cal. 25.) We do not believe that the statute, by empowering city and county attorneys to bring actions on behalf of the People of the State, operates to deprive concerned cities or counties from maintaining such actions in their own behalf. (See Johnson v. V.D. Reduction Co. (1917) 175 Cal. 63, 66 [noting that it was not the intent of the Legislature in enacting the 1905 amendment to Code of Civil Procedure section 731 to diminish the preexisting rights of private parties to maintain public nuisance actions].)

We hold that the City of Corona, as a beneficially interested party in the proceedings below, is a proper party to the petition.

We turn now to our final task, which is to determine whether the trial court properly granted the motion to quash on the grounds that the production of the subpoenaed materials was privileged under the Fifth Amendment.

In Fisher v. United States (1976) 425 U.S. 391, the United States Supreme Court held that the Fifth Amendment privilege against self-incrimination applies only where an individual is "compelled to make a testimonial communication that is incriminating." (Id., at p. 408; original emphasis.) Hence three elements must exist simultaneously before the Fifth Amendment is violated: (1) compulsion of a (2) testimonial communication that is (3) incriminating. (Fisher v. United States, supra, 425 U.S. at 408; United States v. Authement (5th Cir. 1979) 602 F.2d 1129, 1131.)

The Fisher court further held, "[a]lthough the contents of a document may not be privileged, the act of producing the document may be." (United States v. Doe (1984) ___ U.S. ___ [79 L.Ed.2d 552, 560], citing United States v. Fisher, Supra, 425 U.S. at 410; emphasis supplied.) Those communicative aspects implicit in the act of production which the Fisher court recognized were three: (existence, (2) possession, and (3) authentication. (Fisher v. United States, supra, 425 U.S. at 410; United States v. Doe, supra, 79 L.Ed.2d at 560.)

According to the Fisher court, however, the Fifth Amendment privilege does not attach in every case in which the act of production would compel defendant to admit that the records exist, that they are in defendant's possession, or that they are authentic. "[T]he more difficult issues are whether the tacit averments . . . are both 'testimonial' and 'incriminating' for purposes of applying the Fifth Amendment. These questions do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof." (Fisher v. United States, supra, 425 U.S. at 410.) When the existence, possession or authentication of the documents are not in issue; when the act of production has "minimal" evidentiary value; or when the hazards of incrimination are "trifling or imaginary," the Fifth Amendment is not implicated. (Fisher v. United States, supra, 425 U.S. at 411; United States v. Doe, supra, 79 L.Ed.2d at 560-561, fns. 12, 13; Marchetti v. United States (1968) 390 U.S. 39, 53.) Thus in Fisher the court explored the potential incriminating impact of compelling an accountant to produce the tax records of a client and determined that the complusion would have only a minimal testimonial value or incriminating effect. "The existence and location of the papers are a foregone conclusion. . . ." (Id., at pp. 411-413.) However, in Doe, the court held that the Fifth Amendment privilege protected a sole proprietor from a government subpoena seeking an exhaustive list of business records, ranging from "telephone toll slips" to "workpapers." (79 L.Ed.2d at 556, fn. 1.) The Doe court deferred to the factual and legal findings of the District and Appellate Courts which had found that the government subpoena was essentially a fishing expedition: "[N]othing in the record . . . would indicate that the United States knows . . . that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession . . . The most plausible inference . . . is that the Government, unable to prove that the subpoenaed documents exist . . . is attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against itself." (United States v. Doe, supra, 79 L.Ed2d at 561, fn. 12, quoting Matter of Grand Jury Empanelled March 19, 1980 (3d Cir. 1982) 680 F.2d 327, 335.)

Numerous cases have applied the Fisher analysis to determine whether the enforcement of a subpoena duces tecum requesting the production of business records carries sufficiently incriminating testimonial significance to invoke the Fifth Amendment privilege against self-incrimination. (See, e.g., In re Grand Jury Proceedings United States (1st Cir. 1980) 626 F.2d 1051, 1056 [submission of a physician's business records would be tantamount to testimony that the documents existed and were authentic]; Matter of Grand Jury Empanelled on January 17, 1980, (D.N.J. 1981) 505 F.Supp. 1041, 1043 [that the records exist and are possessed by the target is a "foregone conclusion" and hence "turning them over does not rise to the level of testimony within the protection of the Fifth Amendment"]; see also the discussion and the cases cited in The Rights of Criminal Defendants and the Supoena Duces Tecum: The Aftermath of Fisher v. United States (1982) 95 Harv.L.Rev. 683.) The issue arises less frequently, however, in the context of obscenity prosecutions or civil actions to abate the dissemination of obscene materials.

In Anderson v. Coulter (Ariz. 1972) 499 P.2d 103, the City of Phoenix, pursuant to a civil action to enjoin the showing of an allegedly obscene motion picture, served upon defendant a subpoena duces tecum to produce the film in question. The affidavit in support of the subpoena described the film. Defendants moved to quash the subpoena based upon the Fifth Amendment privilege against self-incrimination. The Anderson court rejected the claim on the grounds that the "existence, identity and authenticity" of the film were already established and need not be proved by reference to defendants' compliance with the subpoena. (Id., at p. 106.) The Anderson court relied in part upon the reasoning of Justice Traynor in Jones v. Superior Court (1962) 58 Cal.2d 56, 60, where he wrote:

> "When the prosecution has ample evidence of the existence, identity and authenticity of documents in the defendant's possession and thus does not need to rely on his knowledge to locate them and to identify them or on his testimony to authenticate them, it may be that his implied admission . . . [from their production] . . .

> would involve too trivial a degree of incrimination to justify invoking the privilege." (Anderson v. Coulter, supra, 499 P.2d at 106.)

In Houston v. Manerbino (Col. 1974) 521 P.2s 166, the Colorado Supreme Court rejected a similar claim with respect to a subpoena ordering defendant to produce an allegedly obscene motion picture. The Houston court deemed it "ludicrous to say that a person can display, promote and show moving pictures . . . and then claim that he has the Fifth Amendment as a shield to prevent production of the moving picture films at a hearing which the courts must conduct on the obscenity issue." (Id., at p. 170.)

Applying the foregoing legal principles and decisions to the facts of the case before us compels the conclusion that real parties are not entitled to invoke the Fifth Amendment privilege with respect to the publications requested in the subpoena. The affidavits and declarations filed in support of the subpoena amply demonstrate that the "existence, possession and authenticity" of the magazines are indeed a "foregone conclusion." (Fisher v. United States, supra, 425 U.S. at 411.) Moreover, real parties themselves need not testify in order to authenticate or identify the books in question, nor obviously could they be forced to do so under the fifth Amendment.

Real parties, however, claim that the incriminatory testimonial disclosure implicit in the act of production goes to the element of "scienter." Penal Code section 311.2 in part provides: "Every person who knowingly . . . possesses . . . with intent to distribute . . . any obscene matter is guilty of a misdemeanor." (See Smith v. California (1959) 361 U.S. 147.) They argue that enforcing the subpoena would "force [them] to acquire sufficient knowledge of the materials to facilitate [their] prosecution for knowingly possessing them for sale." They contend that Anderson and Houston are distinguishable from this case because the defendants' knowledge of the contents of the films at issue there could be easily inferred from their frequent showings to the public.

Real parties correctly state that the element of scienter in Penal Code section 311.2 requires knowledge by a defendant of the contents of the subject matter. (People v. Aday (1964) 226 Cal.App.2d 520, 540, cert den. 379 U.S. 931 (1964).) However, we are not persuaded that the acts of gathering and producing the materials requested would be of any evidentiary value in establishing real parties' knowledge of the subject matter. The subpoena does not require real parties to open the books and peruse the contents. It simply requires them to produce the books. To uphold real parties' fatuous claim that the act of production constitutes an implicit admission of knowledge of the contents of the items requested would be ludicrous. We, therefore, conclude that the motion to quash was improvidently granted.[2]

Let a peremptory writ of mandate issue directing the Riverside Superior

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[2] **Because we hold that the materials are not protected by the Fifth Amendment privilege against self-incrimination, we need not reach petitioners' contention that the "Book Store" clerk may not raise a Fifth Amendment claim as to magazines which are not his personal property, but rather which he holds in a representative capacity. In passing, we note that all of the cases cited by petitioners concerned business records-- none involved the possession for sale of allegedly obscene material or potential criminal liability under an obscenity statute.**

Court to vacate its protective order and to issue a new order directing the production of the subpoenaed items forthwith.

The alternative writ is ordered discharged.

CERTIFIED FOR PUBLICATION

Rickles
J.

We concur:

Morris
P.J.

McDaniel
J.

EXHIBIT "E"

AGREEMENT FOR LEGAL SERVICES BETWEEN JAMES J. CLANCY AND CITY OF CORONA, EXECUTED ON JUNE 1, 1983.

(Reference: Petition at pg. 4)

AGREEMENT FOR LEGAL SERVICES

THIS AGREEMENT, made and entered into this 1st day of June, 1983, by and between the CITY OF CORONA, a municipal corporation of the State of California ("CITY"), and JAMES J. CLANCY, ESQ., Attorney at Law, 9055 La Tuna Canyon Road, Sun Valley, California 91352 ("ATTORNEY").

WITNESSETH:

Recitals:

1. CITY desires to employ an attorney at law to assist the City Attorney in the event that the City Council of the CITY should determine to undertake litigation to abate certain conditions within the CITY, determined by the Council to be public nuisances, or to defend the CITY if it should be named as a party defendant in any action or actions or proceeding or proceedings

arising from such determination by the Council, or testing the power of the CITY or the Council so to do, or litigation otherwise arising out of Ordinance No. 1689 of the CITY.

2. ATTORNEY is licensed to practice law in the State of California, and desires to undertake said employment.

WHEREFORE, in consideration of their mutual covenants and agreements, hereinafter contained, and subject to the terms and conditions hereof, the parties hereto do hereby agree as follows:

A. Employment of Attorney

CITY hereby agrees to employ attorney, for the fees hereinafter specified, to assist the City Attorney of CITY, when and as requested by said City Attorney to do so, in connection with litigation to abate certain conditions within the CITY, determined by the Council under the provisions of

Ordinance No. 1689 to be public nuisances, or to defend the CITY if it should be named as a party defendant in any action or actions or proceeding or proceedings arising from any such determination by the Council, or testing the power of CITY or the Council to do so, or otherwise arising out of Ordinance No. 1689 of the CITY. ATTORNEY accepts said employment and agrees to perform all of such services as may be requested by the City Attorney of the CITY in timely and efficient manner.

B. Payment For Services Rendered

CITY agrees to pay to Attorney, and ATTORNEY agrees to accept from CITY, as and for payment in full for all of said services, such sum of money as shall be determined according to the following formula:

$60.00 per hour for each hour of ATTORNEY's services, plus out of pocket office expenses incident to such employment, provided, however, that with respect to each and every suit undertaken by ATTORNEY hereunder which results in a final judgment against CITY, said fee shall be reduced to $30.00 per hour, plus out of pocket office expenses incident to such employment, and provided further that said fee of $60.00 shall also be reduced to $30.00 per hour, plus out of pocket office expenses incident to such employment, in each and every suit undertaken by ATTORNEY hereunder in which CITY is the successful party if and to the extent that the CITY does not recover its attorney's fees from the unsucessful party or parties.

C. Control of Litigation

ATTORNEY agrees that each and every case, suit or proceeding in which he undertakes to assist the City Attorney of CITY, as aforesaid, shall be and remain under and subject to the control and direction of said City Attorney or the City Council of CITY at all stages, and that he shall at all times keep said City Attorney informed of all matters pertaining thereto. ATTORNEY further agrees that if and when his employment hereunder is terminated by CITY as hereinafter specified, he shall return to said City Attorney any and all files then in his possession concerning each and every case, suit or proceeding in which CITY is a party, whether the same be then reduced to final judgment or not.

D. Attorney An Independent Contractor

It is mutually agreed by and between the parties that in the performance of his covenants hereunder ATTORNEY is and shall be an independent contractor and not an officer or employee of CITY.

E. Term of Agreement

The term of this Agreement shall commence on the date first hereinabove written, and shall end on a date in the future, which shall be not less than thirty (30) days from and after the date when CITY informs ATTORNEY, in writing, addressed to ATTORNEY at his address aforesaid, deposited in the United States mail, postage prepaid, or when ATTORNEY informs CITY in writing, addressed to the City Attorney, 4200 Orange Avenue, Riverside, California 92502, of its or his intention to terminate this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

CITY OF CORONA
A municipal corporation
State of California

By Lewis Hall
Mayor

ATTEST:

Diedre D. Lingenfelter
City Clerk of the City of
Corona, California

APPROVED AS TO FORM:

City Attorney

JAMES J. CLANCY, ESQ.

By James J. Clancy
"ATTORNEY"

APPENDIX F

LTERNATIVE WRIT OF MANDATE OF COURT OF APPEAL, OURTH APPELLATE DISTRICT, DIVISION 2, FILED AY 15, 1984 . . . . F1-F2

Reference: Petition at page 18)

F-1

COURT OF APPEAL----STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA, in relation to the CITY ATTORNEY OF CORONA, CALIFORNIA; CITY OF CORONA, a municipal corporation, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE, Respondent. THE "BOOK STORE," etc., et al., Real Party in Interest.	E000934 COUNTY NO. 160755 Court of Appeal-4th District-Filed May 15, 1984, Keenan G. Casady, Clerk

THE COURT:

Good cause appearing therefor,

The Petition for Writ of Mandate is GRANTED.

An alternative Writ of Mandate shall issue directing the Riverside Superior Court to set aside and vacate its order dated April 20, 1984, entered in action no. 160755, entitled People of the State of California, etc., et al., v. The "Book Store," etc., et al., or in the alternative, to SHOW CAUSE before the State Court of Appeal, at its courtroom, 303 West Third Street, San Bernardino, California, at 9:30 a.m. on August 1, 1984, why said order should not be vacated, set aside, and annulled, and a new order entered denying defendants' motion for protective orders and quashing subpoena duces tecum.

Petitioner is directed to have the Alternate Writ of Mandate issued, served, and filed on or before May 28, 1984, and the written return of Respondent and/or Real Party in Interest is ordered filed on or before June 27, 1984. Petitioner shall have to and including July 9, 1984, to file its Traverse, if any.

McDaniel, J.
Acting P.J.

APPENDIX G

CORONA PRESS-ENTERPRISE NEWS ARTICLES DATED SEPTEMBER 17, 1981, REPORTING ON PUBLIC HEARINGS RE THE "BOOK STORE" LOCATION. . G1-G5

Reference: Petition at page 5)

G-1

Thursday, September 17, 1981 Press-Enterprise

Corona adopts a law to regulate locale of adult bookstores

By IRIS HAYWARD
Corona-Norco Bureau

CORONA — The City Council last night unanimously adopted an urgency ordinance, which went into effect immediately, regulating adult bookstores.

The ordinance was opposed by Roger Diamond, attorney for Helen Ebel, owner of the only such store in the city.

It left undefined exactly when the city would require Ebel to move her store on West 6th St. It is 200 feet from St. Edward's School.

The ordinance mentions a 60-day grace period, but City Attorney Dallas Holmes said he wasn't sure if compliance could take place that fast, and it might have to be discussed in another forum.

He was apparently referring to a hearing scheduled Sept. 28 in U.S. District Court in Los Angeles on an injunction prohibiting Corona from banning adult bookstores. Diamond pointed out that Ebel has signed a five-year lease on her store.

Diamond said if she must move, the city should have to pay her relocation costs. There are several locations where an adult bookstore could go under the ordinance, including Corona Mall, a commercial area on West 6th St. and two shopping centers on north Main Street.

The urgency ordinance notes that it is being adopted immediately because St. Edward's School has 365 minor children, many of whom must pass directly in front of the store. School began Sept. 8.

The ordinance says the council has determined that exposure to such a business poses a threat to children, and that "lawlessness and disorderly conduct" may result from "uncontrolled exhibition of explicit sexual conduct."

The urgency ordinance vote followed the adoption on first reading of a zone text amendment which would carry the same regulations as the urgency ordinance.

The amendment would be subject to a second hearing Oct. 7 and would not go into effect for 30 days after that time.

On Holmes' advice, the council took the two steps in an effort to get the present store moved from the vicinity of St. Edward's faster. Holmes said if the urgency ordinance were successfully challenged in court, the city could still rely on the text amendment, which will go into effect in seven weeks.

Both amendment and ordinance state adult bookstores cannot be located within 750 feet of a school, church, park or recreational facility and cannot adjoin residential areas. They totally ban sale of sexual paraphernalia.

Left open was the question of later adoption of another ordinance suggested by James Clancy, an attorney with the Citizens for Decency Through Law.

Clancy said Redondo Beach and Arcadia have taken this approach, after adopting an ordinance regulating adult bookstores.

He said the second ordinance would state that adult bookstores were a public nuisance and offensive to the community. Their purpose would be to attempt to set the stage for a legal effort to get rid of adult bookstores under other grounds being tested in the courts. It has been ruled by the U.S. Supreme Court that adult bookstores are protected by the First Amendment to the Constitution.

From 75 to 100 people attended the hearing and several of them spoke against having an adult bookstore in the city. Petitions containing 3,997 signatures were presented, opposing adult bookstores.

Letters were also presented from owners of 70 businesses who oppose the bookstore. Others who have opposed adult bookstores include the Corona-Norco School Board, St. Edward's School Board and the Chamber of Commerce.

Thursday, September 17, 1981

Ordinance limits bookstore location

By Rob Wagner
Staff Writer

An urgency ordinance requiring adult bookstores to be located at least 750 feet from schools, churches and recreational facilities frequented by minors, was adopted unanimously by the Corona City Council last night before a capacity crowd.

The ordinance will go into effect immediately, but it allows Helen E. Ebel--who owns Corona's only sex shop--60 days to move her business from her present location at Sixth and Crawford Streets. The bookstore is located about 200 feet from St. Edward's Catholic Church and school.

A zone text amendment with the same regulations also was adopted unanimously by the council. This two-step procedure was suggested by City Attorney Dallas Holmes because if the urgency ordinance is successfully challenged in court, the city can still use the zone text amendment. The amendment is expected to go into effect in seven weeks. A second hearing on the matter is scheduled Oct. 7.

The ordinance also bans the sale of sexual paraphernalia.

The amendment and ordinance was vigorously opposed by Attorney Roger Diamond who is representing Ebel. The bookstore owner was in the audience last night but she didn't make her presence known to the more than 100 persons present.

The mood of the crowd, many of whom were standing in the hallway listening to the proceedings on a public address system, was in sharp contrast to last week's city planning commission meeting. Local residents at that meeting were emotional, if not at times abusive, to commission members who ultimately recommended to the council adoption of the zone text amendment.

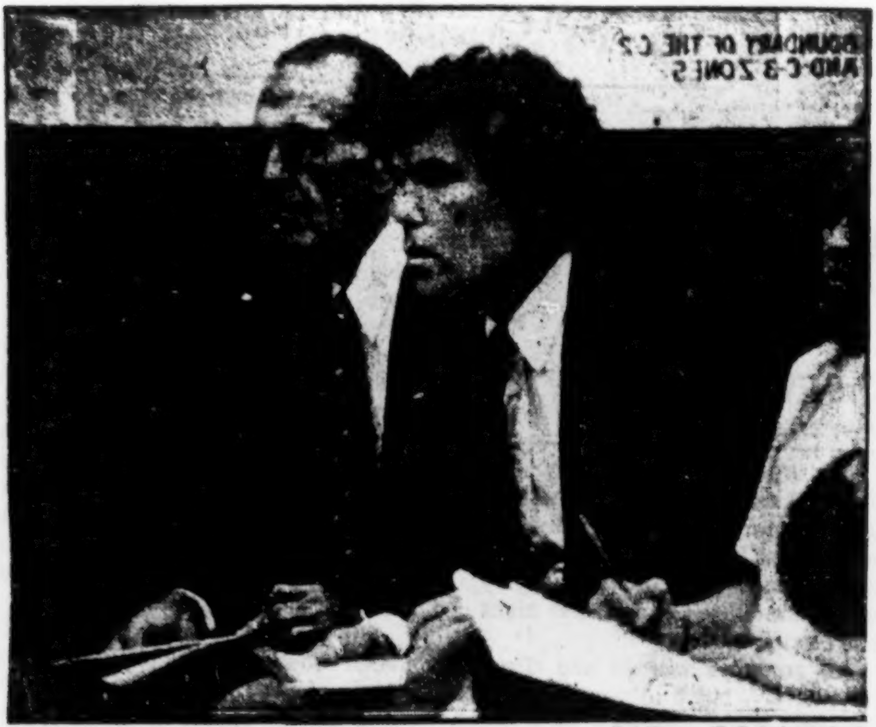
But last night, the crowd was subdued if not courteous to Diamond. If the audience knew who Ebel was, they did not approach her about her bookstore operation.

During the public hearing, Diamond called the ordinance "defective" because he said the law limits adult bookstores to certain areas. He said that by sanctioning such businesses that way, it could allow organized crime to come into the area and purchase large amounts of business property for such uses.

The attorney also questioned the word "obscene," noting that he believes the material sold in Ebel's adult bookstore is "sexually explicit" rather than obscene.

James Clancy, however, an attorney representing the Corona chapter of the Citizens for Decency Through Law, said he visited the adult bookstore prior to the meeting and believed the business was simply a "smut emporium" and the material sold by Ebel was hard-core pornography.

Clancy suggested that a second ordinance be adopted that would state that adult bookstores were a public nuisance and offensive to the com-



Rob Wagner/Daily Independent

Attorneys Jim Clancy and Roger Diamond at last night's City Council meeting.

munity. Similar ordinances, he said, were passed in Redondo Beach and Arcadia.

Diamond, however, questioned the constitutionality of the present ordinance considered by the council. "The ordinance drafted is unconstitutional," he said. "The ordinance was adopted with one particular location in mind...in reference to one store. Not the general problem but dealing with Helen Ebel."

Diamond acknowledged the organized efforts to ban or strictly regulate adult bookstores in Corona, and even commended those persons involved in the movement, but he said that he believes there is a "silent majority" in Corona that prefers to have the adult bookstore open. He said that many persons who have visited Ebel's adult bookstore were "pleased with the store."

Father Ivan Fitzwilliam, pastor at St. Edward's, presented the council with a petition with 3,997 signatures opposing the presence of the adult bookstore. The Council also received several letters from a 9th grade class stating opposition. The Corona Chamber of Commerce also sent the council a letter, urging the panel to adopt the most stringent ordinance as permitted under law.

Virginia Segal, secretary of CDL and a local businesswoman, presented the council with 70 letters from local businesses opposing the establishment of adult bookstores.

The council determined that an urgency ordinance is necessary for the following reasons as stated in the ordinance:

- "A seller of sex-oriented materials...is presently located within 300 feet of a church-operated private school which has been in session since Sept. 8.

- "The private school has a current enrollment of at least 365 children many of whom must pass directly in front of the adult bookstore on their way to and from school, and many of whom are necessarily unsupervised by an adult during the time they go to and from school.

- "The city council has determined that exposure to the unregulated commercial exploitation of sexual conduct presents a clear danger to the health, safety and morals of children and families of children.

- "The city council also determined that lawlessness and disorderly conduct may be engendered by the uncontrolled exhibition of explicit sexual conduct, and such lawless conduct may constitute a danger to children who may be in the vicinity o a seller of sex-oriented materials."

Diamond told the council that Ebe signed a 5-year lease on the property at Sixth and Crawford, and if she is required to move within 60 days, the city may be required to compensate the bookstore owner. Mayor Tom Gunderson replied that it's possible that the owner of the property may release Ebel from that lease.

APPENDIX H

LETTER OF ATTORNEY MEREDITH A. JURY OF OCTOBER 18, 1985, TO ATTORNEY ROGER DIAMOND RE PAYMENT OF ATTORNEY'S FEES AND SETTLEMENT OF CASE WITH CITY OF CORONA. H1-H

(Reference: Petition at page 9, Footnote 1)

LAW OFFICES OF
BEST, BEST & KRIEGER
4200 ORANGE STREET
P.O. BOX 1028
RIVERSIDE, CALIFORNIA 92502
TELEPHONE (714) 686-1450

October 18, 1985

Roger Diamond, Esq.
Hecht, Diamond & Greenfield
15415 Sunset Boulevard
Pacific Palisades, CA 90272

Re: City of Corona adv.
Ebel

Dear Roger:

This letter will confirm our telephone conversations of October 18, 1985 and earlier dates regarding the agreement between our respective clients to settle all pending litigation, including the Federal Court action filed by Mrs. Ebel against the City of Corona and the State Court action filed by the City of Corona for the People of California against Mrs. Ebel. We have agreed that both cases will be settled on the following terms:

1. Mrs. Ebel will vacate the premises on December 2, 1985.

2. The City will hold Mrs. Ebel harmless with respect to the remaining portion of her lease, through April 1, 1986.

3. The City will pay to Hecht, Diamond & Greenfield the sum of $97,000 for attorney's fees accrued in the Federal Court

action and a portion of the attorney's fees in the State Court action. You will provide me with invoice billings for the full amount due in the Federal Court case and the portion due in the State Court case. The total of those billings will be $97,000 for attorney's fees. Mrs. Ebel will receive no check for damages.

4. A press release will be issued by Dallas Holmes of Best, Best & Krieger during the week of October 21st. There will be no further comment by either attorney or either party to the press.

5. The complaint and cross-complaint in the State Court action will be dismissed as moot.

6. The petition for rehearing in the State Court action will be dismissed as moot.

7. The Federal Court action will be dismissed as settled and the motion for fees in the Federal Court will be taken off calendar.

8. All paperwork necessary to consummate the settlement except for dismissal documents shall be prepared by Best, Best & Krieger. Dismissal documents shall be prepared by the appropriate plaintiff and cross-complainant in the

pending cases.

9. Following from the above terms, Mrs. Ebel will not extend the lease on the property prior to the completion of this settlement.

10. The $97,000 shall be tendered by the City to Hecht, Diamond & Greenfield on December 2, 1985, simultaneously with the vacation of the premises by Mrs. Ebel.

As I explained to you during our conversation, I am engaged in trial in Bakersfield and the paperwork will be prepared at the earliest by the end of next week. If you disagree with any of the terms of the settlement as above stated, please notify our office immediately.

Very truly yours,

Meredith A. Jury of
BEST, BEST & KRIEGER
City Attorneys
City of Corona

MAJ:ng
cc: James D. Wheaton
William Ketteman
James J. Clancy

APPENDIX J

RESOLUTION NO. 86-9

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CORONA, CALIFORNIA, AUTHORIZING THE FILING OF A PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT. J1-J16

(Reference: Petition at page)

RESOLUTION NO. 86-9

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CORONA, CALIFORNIA, AUTHORIZING THE FILING OF A PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

WHEREAS, the City Council of the City of Corona, California, did, on June 1, 1983, enter into a contract with James J. Clancy, Attorney at Law, 9055 La Tuna Canyon Road, Sun Valley, California 91352, for the following legal services:

> ". . . to assist the City Attorney in the event that the City Council of the CITY should determine to undertake litigation to abate certain conditions within the CITY, determined by the council to be public nuisances, or to defend the CITY if it should be named as a party defendant in any action or actions or proceeding or proceedings arising from such determination by the Council, or testing the power of the CITY or the Council so to do, or litigation otherwise arising out of Ordinance No. 1689 of the CITY,"

involving enforcement of Sections 9.16.010 through 9.16.090 of the Corona Municipal Code, and said attorney did accept said employment and agree "to perform all of such services as may be requested by the City Attorney of the CITY in timely and efficient manner;" and

WHEREAS, at the time said contract was made, Civil Code Section 3496 had recently been enacted and became effective on January 1, 1983, and read as follows:

> ". . . In a case in which the court enjoins the sale, distribution or public exhibition, for commercial consideration, of obscene matter, as defined in Section 311 of the Penal Code, the court may award costs to the prevailing government agency which brought the action. Such costs may include the costs of investigation and reasonable attorney fees."

WHEREAS, under paragraph "B" of said contract, the City was obligated to pay James J. Clancy at his hourly rate of $60.00 per hour, one half of which was to be paid out of public funds, and payment of the balance of $30.00 per hour was made conditional and was not to be paid out of public funds or if the City lost, but was only due and payable out of any judicial award which the trial court might make to the City under Civil Code Section 3496, as the prevailing party and against the person maintaining the public nuisance, and in no event was James J. Clancy to receive more than $60.00 per hour for such services; and

WHEREAS, paragraph "C" of said contract provided as follows in regard to the control of any litigation which is commenced pursuant to such contract:

> " C. Control of Litigation
>
> ATTORNEY agrees that each and every case, suit or proceeding in which he undertakes to assist the City Attorney of CITY, as aforesaid, shall be and remain under and subject to the control and direction of said City Attorney or the City Council of CITY at all stages, and that he shall at all times keep said City Attorney informed of all matters pertaining thereto. . . .;" and

WHEREAS, the City Council of the City of Corona, California, did, on December 22, 1983, enact Resolution No. 83-102 entitled:

> " RESOLUTION NO. 83-102
>
> RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CORONA, CALIFORNIA, DECLARING A PUBLIC NUISANCE AND ORDERING THE SPECIAL COUNSEL TO TAKE ALL STEPS NECESSARY TO ABATE THE SAME AND RECOVER THE CITY'S COSTS OF INVESTIGATION AND ATTORNEY FEES"

wherein it did find and determine that the "adult book store" located at 601 West Sixth Street was a place of business in the City of Corona in which obscene publications constituted all of the stock in trade, or a principle part thereof, which was proscribed by Section 9.16.040(a) of the Corona Municipal Code, and in closed session did conditionally declare said real property to be a public nuisance which required judicial confirmation and abatement pursuant to the provisions of Sections 9.16.040(a) and 9.16.070(a) of the Corona Municipal Code; and in subparagraph B of Section 6 of said Resolution did order James J. Clancy to proceed as follows:

> " B. The Special Counsel is hereby ordered to proceed as directed in Section 9.16.080 of the Corona Municipal Code, and to take all steps and do all things necessary to abate such nuisances and obtain the relief designated therein, through the judicial proceedings specified therein;" and

WHEREAS, the City Council of the City of Corona on May 2, 1984, did enact Resolution No. 84-35 which amended subparagraph B of Section 6 of Resolution No. 83-102, to read as follows:

> "SECTION 6.
>
> . . .
>
> B. The Special Counsel is hereby ordered to commence a civil lawsuit naming as plaintiffs the City of Corona and People of the State of California, on the relation of the

> City Attorney of Corona, California, on relation of the City Attorney of Corona, California, and to proceed as directed in Section 9.16.080 of the Corona Municipal Code, and to take all steps and do all things necessary to abate such nuisances and obtain the relief designated therein, through the judicial proceedings specified therein.;" and

WHEREAS, James J. Clancy, on January 6, 1984, did file a "Complaint for Abatement of Public Nuisances, Declaratory Judgments; Injunctions" in the Riverside County Superior Court, entitled:

> "PEOPLE OF THE STATE OF CALIFORNIA ex rel. JAMES J. CLANCY, as Special Attorney for the City of Corona, California; CITY OF CORONA, a Municipal Corporation,
>
> Plaintiffs,
>
> v.
>
> THE "BOOK STORE," BEING A BOOKSTORE AND MOTION PICTURE ARCADE, located at 601 West Sixth Street, Corona, County of Riverside, California; HELEN E. EBEL; THOMAS CHARLES EBEL; EUGENE VAN ZEE; Does 1 through 10, inclusive,
>
> Defendants.;"

and on April 20, 1984, did move to amend the title of the complaint and the Riverside County Superior Court did grant Plaintiffs' motion and did order the caption of the complaint to be amended to read:

> "PEOPLE OF THE STATE OF CALIFORNIA, on the relation of the CITY ATTORNEY OF CORONA, CALIFORNIA; CITY OF CORONA, a Municipal Corporation,
>
> Plaintiffs,
>
> v.
>
> THE "BOOK STORE," BEING A BOOKSTORE AND MOTION PICTURE ARCADE, located at 601 West Sixth Street, Corona, County of Riverside, California; HELEN E. EBEL; THOMAS CHARLES EBEL; EUGENE VAN ZEE; Does 1 through 10, inclusive,
>
> Defendants.;"

and did find and determine that Dallas Holmes, the City Attorney of the City of Corona was the plaintiff in said action, and that James J. Clancy was appearing as an attorney who had been authorized by Mr. Holmes to bring the action on behalf of the City Attorney of the City of Corona; and

WHEREAS, James J. Clancy did proceed as the attorney of record under said amended complaint as directed in Section 9.16.080 of the Corona Municipal Code and, pursuant to said contract and directive, did thereafter on May 1, 1984, file a petition for writ of mandate in the Court of Appeal of the State of California, Fourth Appellate District, Division 2, Civil No. E-000934 (Riverside County Superior Court No. 160755) seeking relief from action taken by the Riverside County Superior Court, which quashed a subpoena duces tecum requiring the production of 262 books and magazines and granted the defendants' motion for a protective order, and did on November 15, 1984, obtain relief in the form of peremptory writ of mandate from the Court of Appeal in such special proceedings known and styled as People of the State of California on relation of the City Attorney of Corona, California; City of Corona, a Municipal Corporation v. the "Book Store," being a bookstore and motion picture arcade, located at 601 West Sixth Street, Corona, County of Riverside, California; Helen E. Ebel; Thomas Charles Ebel; Eugene Van Zee; Does 1 through 10, inclusive, Civil No. E-000934 (Riverside County Superior Court. No. 160755); and

WHEREAS, the Supreme Court of the State of California did grant a hearing and review the Court of Appeal's judgment in said special proceedings and on September 16, 1985, did file its judgment wherein it did change the name and designation of the Petitioners in the special proceedings filed in the Court of Appeal from that of "People.of the State of California, on relation of the City Attorney of Corona, California; City of

Corona, a Municipal Corporation, Petitioners,. . ." to that of "The People ex rel. James J. Clancy, as City Attorney, etc., et al., Petitioners, . . .," and did direct the trial court to vacate its order that the magazines listed in the subpoena need not be produced and issue a new order enforcing the subpoena, but did also order the Riverside County Superior Court to issue a new order "dismissing Clancy as the City's attorney in the pending action" on the grounds that "the contingent fee arrangement between the City and Clancy (was) antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action;" and

WHEREAS, the Supreme Court of the State of California did also rule in a footnote that "on remand the action herein should be brought in the name of Dallas Holmes, the Corona City Attorney. The City may hire Clançy to represent Holmes;" and

WHEREAS, the federal courts have interpreted civil rights legislation in a manner which encourages rather than discourages the use of contingent attorney's fees as a means of stimulating litigation which will promote civil rights legislation; and the City of Corona contends that Sections 9.16.010 through 9.16.090 of the Corona Municipal Code, which are being enforced in the above litigation, qualify as civil rights legislation codifying the common law right of its residents to be free from the debasing influences of obscene public nuisances and the common law duty of City Councils to abate such per se moral nuisances; and

WHEREAS, defense attorney Roger

Diamond informed the California Supreme Court during oral argument that he had recently been awarded an attorney's fee from the City of Corona in a Civil Rights Action brought by the Defendant Ebel, acting as a federal plaintiff in 1981 against the City's efforts to apply to her business a Corona Zoning Ordinance which regulated establishments whose stock in trade is distinguished or characterized by an emphasis on matters relating to "specific sexual activity" and "specific anatomical areas;" and in defense attorney Roger Diamond's motion for an attorney's fee for representation of the Plaintiff Ebel in that Civil Rights Action against the City of Corona, Roger Diamond sought from the Court a contingent (Plaintiffs') attorney's fee at the rate of $175.00 per hour, and was awarded by the Court a contingent (Plaintiffs') attorney's fee at the rate of $175.00 per hour; and

WHEREAS, James J. Clancy has recommended that a petition for writ of certiorari be filed in the United States Supreme Court to review the judgment of the California Supreme Court as modified on November 20, 1985, on the grounds of several important federal questions involving the City of Corona's right to equal protection of the laws and due process of law under the Fourteenth Amendment, the civil rights of its citizens to be free from the debasing influences of obscene public nuisances, and the City's claim of interference with and impairment of the City's freedom to contract with James J. Clancy in violation of the Fourteenth Amendment to the United States Constitution, and has offered to provide the legal services for said petition as a pro bono publico attorney and at no cost to the City of Corona.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF CORONA DOES RESOLVE as follows:

Section 1. Pursuant to Section 37103 of the California Government Code, the offer of James J. Clancy to act as a pro bono publico attorney at no cost to the City of Corona, and to provide the necessary legal services for the filing of the aforesaid petition for writ of certiorari in the United States Supreme Court, is accepted; and

Section 2. James J. Clancy is hereby authorized and directed to file said petition for writ of certiorari in the United States Supreme Court and to name as petitioners on said petition, the City of Corona, a Municipal Corporation, and the City Attorney of the City of Corona.

ADOPTED this 5th day of February, 1986.

S.R. Al Lopez
Mayor of the City of Corona,
California

ATTEST:

Diedre D. Lingenfelter
City Clerk of the City of
Corona, California

CERTIFICATION

I, DIEDRE' D. LINGENFELTER, City Clerk of the City of Corona, California, do hereby certify that the foregoing Resolution No. 86-9 was regularly introduced and adopted by the City Council of the City of Corona, California, at a regular meeting thereof held on the 5th day of February, 1986, by the following vote of the Council:

AYES: COUNCILMEN DEININGER, FRANKLIN, LOPEZ, MILLER, MILLER

NOES: NONE

ABSENT: NONE

ABSTAINED: NONE

IN WITNESS WHEREOF, I have hereunto

set my hand and affixed the official seal of the City of Corona, California, this 5th day of February, 1986.

Diedre D. Lingenfelter
City Clerk of the City of
Corona, California